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Supreme Court of the United States

OCTOBER TERM, 1993

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, DR. C.T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART, AND DR. WARREN DICKERSON,

Appellants,

v.

NED MCWHERTER, GOVERNOR OF TENNESSEE, JOHN WILDER, LIEUTENANT GOVERNOR AND SPEAKER OF THE TENNESSEE SENATE, JAMES NAIFEH, SPEAKER OF THE TENNESSEE HOUSE OF REPRESENTATIVES, WILL BURNS, COORDINATOR OF ELECTIONS, AND LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAE ESQUE, SPENCE DUPREE, BOBBY WHITE, AND LINDA BURNETT, REGISTRARS OF FAYETTE, HARDEMAN, HAYWOOD, LAUDERDALE, MADISON, SHELBY, AND TIPTON COUNTIES,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

The three-judge district court found that Tennessee's 1992 state Senate redistricting plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The court, however, failed to order a full and complete remedy for the violations that it found. The questions presented are:

1. Whether, under Section 2, total population, rather than voting age population, is the appropriate numerical basis for judging the representative fairness of a redistricting plan?

2. Whether, after a finding of liability under Section 2, a court can use the proportionality disclaimer found in subsection (b) of the Act as a remedy cap?

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

Appellants, the Rural West Tennessee African-American Affairs Council and eight African-American residents and registered voters in Tennessee, appeal from a judgment of a three-judge district court holding that the state of Tennessee was required to draw only one additional majority-minority state Senate district to remedy dilution of African-American voting strength, in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, in its 1992 state Senate redistricting plan.

OPINION BELOW

The opinion of the three-judge United States District Court for the Western District of Tennessee (J.S. App. at 1a-32a) is reported at 836 F. Supp. 453.

JURISDICTION

The judgment of the district court was entered on November 4, 1993. J.S. App. at 2a-3a. A timely motion to alter or amend the judgment was denied on November 29, 1993. J.S. App. at 33a-34a. A timely notice of appeal was filed in the district court on December 28, 1993. J.S. App. at 35a.

The jurisdiction of the three-judge district court was invoked under 28 U.S.C. §§ 1331, 1343(a)(4), and 2284. J.S. App. at 40a. The appellate jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process

and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

Appellants, Rural West Tennessee African-American Affairs Council[1] ("RWTAAAC") and eight individual African-American residents and registered voters of Tennessee, filed suit against the State of Tennessee on May 15, 1992, challenging the entire 1992 Tennessee state Senate redistricting plan. Appellants' allegations focussed on the redistricting plan's dilutive effects in southwestern Tennessee, because that was the area of the state in which additional majority-black districts could be drawn. Appellants alleged that the 1992 state Senate redistricting plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and several amendments to the United States Constitution.[2] Jurisdictional Statement Appendix ("J.S. App.") at 39a-40a. The RWTAAAC specifically alleged that the state Senate redistricting plan diluted minority voting strength by fragmenting or packing the African-American population of the seven counties in southwestern Tennessee[3] so that African-Americans are the

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1. The Rural West Tennessee African-American Affairs Council, Inc. is a non-profit Tennessee corporation established to promote voter registration, education, and political participation. It has no parent companies or subsidiaries. The Memphis Branch NAACP intervened in this action but is not a party to this appeal.

2. The RWTAAAC's complaint also alleged that the state's 1992 redistricting plan for the Tennessee House of Representatives violated Section 2. J.S. App. at 42a. That claim, however, is not at issue in this appeal.

3. In challenging the entire 1992 Tennessee state Senate redistricting plan, Appellants alleged that specific dilutive effects took place in the seven counties of southwestern Tennessee: Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton Counties.

majority in only two districts, "although it is possible to draw at least four (4) reasonably compact and contiguous senate districts in the seven county area that contain a majority of African-American residents." J.S. App. at 42a. Appellants alleged a statewide pattern of discrimination against blacks, including discrimination in voting, J.S. App. at 43a, and introduced substantial evidence in support of their statewide allegations. *See, e.g.*, Pl. Ex. 11, Plaintiffs' First Request for Judicial Notice as to Law and Judicial Decisions; *see also* Pl. Exhs. 50-56, 69.[4] Citing racial polarization in voting and other factors, Appellants alleged that "the newly enacted legislative districting in Tennessee dilutes the voting strength of African-Americans," J.S. App. at 43a, and that "African-Americans in southwestern Tennessee have less opportunity than white residents to participate in the political process and elect candidates of their choice." *Id.*

Appellant RWTAAAC's suit was consolidated with a redistricting suit filed by another group of plaintiffs (the *Langsdon* plaintiffs), who challenged the 1992 Tennessee state House redistricting plan on Fourteenth Amendment, Voting Rights Act, and other grounds.[5]

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4. Pl. Ex. 11 was a compilation of laws and judicial decisions, many of which were of statewide application. Pl. Ex. 50 showed voting, election, poll tax, population, political party, and black population statistics for the state as a whole. Pl. Ex. 56, a report of the U.S. Commission on Civil Rights, showed black office holders throughout the state as of February 1, 1968. Other exhibits showed statewide census data by race, voter registration, and state requirements for registration and voting.

5. Prior to trial on the merits, the three-judge court declared in summary judgment that the state House redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. *Langsdon* v. *Milsaps*, 836 F. Supp. 447 (W.D. Tenn. 1993). The court concluded that this finding rendered the RWTAAAC challenge to the House redistricting plan moot. However, on February 23, 1994, the three-judge court reserved judgment on a newly-enacted remedial state House plan in light of the issues involved in these appeals concerning the state Senate redistricting plan. J.S. App. at 37a-38a.

Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), the three-judge district court concluded that "it is clear that the 1992 Senate reapportionment plan violates § 2 of the Voting Rights Act." J.S. App. at 29a. Addressing the first prong of the *Thornburg* v. *Gingles* threshhold test, the court found that the African-America communities in urban Shelby County and rural west Tennessee were sufficiently large and geographically compact to draw additional majority African-American state Senate districts in each area. J.S. App. at 4a. The court made both statewide and rural west Tennessee specific findings addressing the dilutive effects of the state Senate redistricting plan. The court noted that Appellants "presented strong evidence of racially polarized voting, the most important [*Gingles*] factor." *Id.* The court found racial polarization in voting in six of the seven rural county elections, with "overwhelming" polarization in five of those contests, and comparable levels of polarization in urban Shelby County. J.S. App. at 9a. In west Tennessee, the three-judge court found "a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice." *Id.*

Political cohesion of the African-American community, the second *Gingles* factor, was never at issue. The three-judge court noted that the parties stipulated that African-American communities in rural west Tennessee and Shelby County are politically cohesive. J.S. App. at 7a. The court also made findings indicative of statewide African-American voter cohesion and vote dilution. The court found that "Tennessee has a long history of official racial discrimination in voting. Although the worst discrimination is in the past, effects of past discrimination are still apparent . . . ." J.S. App. at 15a. Slavery was "officially sanctioned" throughout the state prior to the Civil War. *Id.* In 1834 the state Constitution was amended to deny the right to vote even to free black men. *Id.* at 16a. Following Reconstruction and

from conducting any elections under the 1992 Senate Plan and ordered the State to submit a new plan by January 25, 1994. *Id.* at 30a.[2]

THE QUESTIONS ARE SUBSTANTIAL

The decision of the district court rested on at least two rulings that warrant plenary review by this Court. First, in finding that the Senate Plan did not ensure electoral success sufficiently proportional to voting-age population, the district court used statewide percentages as the measure, even though vote dilution under *Gingles* was concededly not proved for any area outside southwest Tennessee. But Section 2 requires that any finding of underrepresentation match up with the area where vote dilution has been proved. In this case, if the proper local figures were used, there could be no finding that African-Americans have disproportionately low electoral opportunities—most starkly as to Shelby County, but also as to southwest Tennessee as a whole. Still less, given the unquestioned influence districts provided by the Senate Plan, could there be a finding that the Senate Plan violates the combined political-participation-and-electoral-opportunity right of Section 2.

Second, in finding that a compact majority-black district could be created in "rural" west Tennessee, the district court relied on proposed districts that were drawn solely on the basis of race, in disregard of all traditional districting principles. But Section 2, and particularly the "compactness" requirement of *Gingles*, cannot be read to condemn a State's failure to create such artificially race-determined districts; indeed, any such interpretation of Section 2 would contravene this Court's decision in *Shaw v. Reno*, *supra*. Appellees have simply not proved, as to their "rural" district, that the Senate Plan's failure to

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[2] The court subsequently denied appellees' motion to alter or amend the judgment, a motion that sought use of total-population figures rather than voting-age population. J.S. App. 31a-32a. The court also denied appellants' request for a stay.

create such a majority-black district is a result of anything other than the State's independently legitimate interest in adhering to normal districting principles.

The district court's rulings raise obviously important questions concerning how Section 2 of the Voting Rights Act applies to single-member districting plans, particularly for state legislatures. The principles governing the scope of required vote-dilution evidence (whether statewide evidence is required if statewide figures are used) and how plaintiffs may define proposed alternative districts (whether they may be exclusively race-based) necessarily will affect the litigation of many Section 2 cases. Both issues are presented, for example, in a suit challenging the Michigan districting plan in a three-judge court in the Eastern District of Michigan. *NAACP v. Austin*, No. 92-CV-72696-DT.[3] The first question, concerning the use of statewide figures in a case limited to a local area, is also presented in a case in this Court, *Johnson v. De Grandy*, No. 92-519 (and related cases), 61 U.S.L.W. 3580 (Feb. 22, 1993) (probable jurisdiction noted), 62 U.S.L.W. 3317 (Oct. 4, 1993) (oral argument). And the second question is presented in a pending case in Maryland. *Marylanders for Fair Representation, Inc. v. Schaefer*, Civ. Nos. S-92-510, S-92-1409.[4]

In addition, decisions of other lower courts conflict with the district court's ruling here. Notably, the three-judge district court in *Nash v. Blunt*, 797 F. Supp. 1488, 1499 (W.D. Mo. 1992), *aff'd*, 113 S. Ct. 1809 (1993), expressly rejected use of statewide proportionality figures where the vote-dilution case was limited to only portions

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[3] *See* Defendants' Trial Brief 36, 30-33 (Nov. 24, 1993); Intervening Defendants' Memorandum on *Rural West Tennessee v. McWherter* at 10 (Dec. 16, 1993); NAACP Plaintiffs' Analysis of *Rural West Tennessee African-American Affairs Council v. McWherter* at 5, 6-8 (Dec. 20, 1993).

[4] *See* Defendants' Trial Memorandum 5-6 (Dec. 16, 1993); Plaintiffs' Hearing Brief 6-8 (Dec. 16, 1993).

of a State. The Fourth Circuit in a Section 2 case decided since *Shaw v. Reno* has rejected a plaintiff-proposed districting plan drawn solely on the basis of race. *Hines v. Mayor & Town Council,* 998 F.2d 1266, 1274 (4th Cir. 1993). More recently, a three-judge district court in *Hayes v. Louisiana,* No. 92-CV-1522 (W.D. La. Dec. 28, 1993), concluded that an irregularly shaped district, drawn for racial reasons and disregarding traditional districting principles, could not be "compact" for purposes of Section 2 of the Voting Rights Act. Opinion 15-16 n.21. In short, the legal issues presented on this appeal are plainly substantial.

1. The district court's first error concerns the issue of proportionality. In determining whether the Senate Plan gives appellees less opportunity to participate in the political process and to elect representatives of their choice, the district court correctly did not dispute that ensured proportional representation—even *roughly* proportional representation—makes a Section 2 claim impossible to sustain.[5] The district court erred, however, in concluding that *statewide* figures were the proper ones to use as the benchmark for electoral success, even in a case where the evidence as to vote dilution is limited to a particular area of the State. J.S. App. 18a-20a. Instead, a proper application of Section 2 must measure electoral success by reference to the numbers for the particular groups of African-

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[5] *Gingles* itself makes this clear. *See* 478 U.S. at 77 (opinion of Brennan, J., joined by White, J.); *id.* at 105 (opinion of O'Connor, J., joined by Burger, C.J., Rehnquist, J. (now C.J.), and Powell, J.). *See, e.g., Baird v. Consolidated City,* 976 F.2d 357, 360-61 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 2334 (1993). The district court essentially acknowledged as much when it said: "If black electoral success statewide was sufficient to elect more black candidates percentage-wise than their population in the state, it would be difficult, if not impossible, to conclude that the district lines resulted in minority vote dilution in violation of § 2." J.S. App. 19a. And the court found *rough* proportionality sufficient when it held that four seats (12.1%) rather than five (15.2%) came close enough to the proportionality figure (14.4%) it used. J.S. App. 29a.

Americans for whom a vote-dilution case is presented—here, the voters in southwest Tennessee.

In accordance with Section 2's proviso disclaiming any guarantee of proportional representation, this Court has insisted repeatedly that plaintiffs alleging illegal vote dilution cannot simply assume that any shortfall in representation is "on account of race" (42 U.S.C. § 1973(a)) but must prove each of the *Gingles* preconditions in every case. *See Shaw v. Reno,* 113 S. Ct. at 2830; *Growe v. Emison,* 113 S. Ct. at 1085; *Gingles,* 478 U.S. at 46. That particularized proof requirement is the minimum necessary to warrant attribution of an alleged deficiency in electoral success to minority-group membership, as Section 2 requires, rather than to some other factor like geographic dispersion or lack of political cohesion.[6] Consequently, unless the *Gingles* preconditions are proved statewide—here, the district court recognized that appellees proved them at most as to southwest Tennessee—there has simply been no proof as to the reason for any subpar statewide success and hence no proof that the shortfall from statewide proportionality reflects a violation. The numbers must match the dilution proof. Electoral success of African-American voters in Mountain City is not relevant to vote dilution claims by African-American voters in the City of Memphis.

Thus, if voting-age African-Americans were evenly dispersed throughout the population everywhere in Tennessee except the southwest Tennessee area at issue here, use of statewide proportionality figures would produce an incorrect result, because areas would be included where the precondition of geographic compactness, and hence vote dilution based on race, could not be shown. By the same token, if voting-age African-Americans in the south-

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[6] The requirement of proof of the *Gingles* factors is particularly important in light of this Court's warning in *Shaw v. Reno,* 113 S. Ct. at 2827, against stereotypical assumptions about defining voting blocs along racial lines.

west Tennessee areas where the *Gingles* analysis has been conducted obtain electoral success in proportion to their numbers, *those* voters have no vote dilution claim. They have equal voting opportunity within the meaning of Section 2, regardless of the statewide percentages. In that situation, use of statewide figures to require additional African-American representation in the litigated areas can only reflect a principle of "virtual representation," whereby black voters in the areas where a violation is proved are entitled to extra representatives in order to represent other citizens, in other areas, who themselves lack a Section 2 claim. Such a radical interpretation of Section 2's guarantee of "voting rights" is simply not sustainable.

In *Gingles* itself, the district court had found vote dilution with respect to District 23, despite proportional representation in that district, based on its finding that statewide "overall results" fell short of proportionality measured statewide. *Gingles v. Edmisten,* 590 F. Supp. 345, 367 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom. Thornburg v. Gingles,* 478 U.S. 30 (1986). This Court reversed, because electoral success was proportional in District 23 *itself.* Justice O'Connor explained in her concurring opinion: "The District Court clearly erred to the extent that it considered electoral success in the aggregate, rather than in each of the challenged districts, since . . . '[t]he inquiry into the existence of vote dilution . . . is district specific.'" 478 U.S. at 103; *see id.* at 60 n.28.[7] So, too, in this case, the

[7] Similarly, in *African-American Voting Rights Legal Defense Fund, Inc. v. Blunt,* 113 S. Ct. 1809 (1993), this Court summarily affirmed the three-judge district court's ruling in *Nash v. Blunt, supra,* which rejected the plaintiffs' claim that additional majority-black districts should have been created in areas of black concentration, where proportionality was already met, to ensure statewide proportionality—and hence representation for citizens outside those areas. 797 F. Supp. at 1499 ("there is no authority to suggest that these citizens' inability to be included together in one or more districts should be 'made up' by increasing the number of

district court erred in using statewide percentages to assess proportionality notwithstanding appellees' limitation of their *Gingles* proof to southwest Tennessee.

Reversal of the district court's choice of statewide numbers would make a critical difference to the result in this case. For example, appellees' claim for an additional seat in Shelby County clearly would fail if that claim were evaluated by reference to the numbers for Shelby County, instead of using statewide figures, because proportionality would readily be found. African-Americans constitute 39.7% of the voting-age population of Shelby County (283,113 out of 600,023), and proportionality would therefore ensure 2.15 majority-black seats among the 5.41 Senate seats in Shelby County.[8] The 1992 Senate Plan in fact guarantees two such seats. It thus provides almost perfect proportionality. Certainly it provides a closer fit than the district court itself deemed sufficient when it found a guarantee of 12.1% of the seats (4 seats) close enough to the statewide proportionality figure of 14.4% (4.75 seats).[9]

The same conclusion would follow from looking at southwest Tennessee as a whole to evaluate both versions of the second additional majority-black district sought by appellees, which included a portion of Shelby County

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minority controlled districts in those areas of the state where black citizens are most concentrated"). *See also Brown v. Thomson*, 462 U.S. 835, 846 (1983) (constitutional case; restricting focus to challenged areas).

[8] The total voting-age population of Tennessee is 3,660,581. Each of 33 Senate seats, therefore, should represent 110,927 voting-age people. Shelby County, with a total voting-age population of 600,023, is entitled to 5.41 seats.

[9] These numbers can be looked at another way, with the same result. The 238,113 African-Americans of voting age in Shelby County make up 6.5% of the total Tennessee voting-age population. The same proportion of the 33 Senate seats would afford that group 2.15 seats.

and portions of other counties in southwest Tennessee. The total voting-age population of all seven counties in southwest Tennessee is 749,322, of whom 283,772—that is, 37.9 percent—are African-Americans. Proportionality would therefore produce 2.56 seats of the 6.76 seats to which the area is entitled.[10] Appellees' claim even for a third (let alone a fourth) majority-black district in southwest Tennessee—as opposed to the two provided by the Senate Plan—is therefore a claim for *more* than proportional representation.

The Senate Plan's departure from perfect mathematical proportionality in the entire area (2 seats versus 2.56) is of course somewhat greater than its departure in Shelby County alone (2 seats versus 2.15). But that sort of difference cannot matter. Plainly it was not the basis for the district court's decision, because the district court itself accepted a comparable approximation to strict proportionality when it used statewide figures (accepting 4 majority-black seats compared with 4.75). Anyway, a contrary insistence on "rounding up" to guarantee *at least* a proportional number would undermine Section 2's proviso disclaiming an entitlement to proportionality and its broader focus on a "totality of circumstances" assessment of whether there is an unequal opportunity "to participate in the political process *and* to elect representatives" (42 U.S.C. § 1973(b) (emphasis added); *see Chisom v. Roemer*, 111 S. Ct. 2354, 2365 (1991)). Particularly here, moreover, where there is an unquestioned prospect for strong influence by sizable minority constituencies (J.S. App. 24a-27a), the Senate Plan cannot be found to deny the required equal opportunity in southwest Tennessee as a whole.[11]

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[10] The 283,772 voting-age African-Americans in the seven counties make up 7.8 percent of the statewide voting-age population. Proportionality would afford them 2.56 seats.

[11] This view of Section 2 gains support from this Court's holding in *Chisom v. Roemer*, 111 S. Ct. at 2365, that a violation of Section

The question raised by the district court's use of statewide figures in a case otherwise focusing on only a part of the State warrants plenary review. Other statewide districting cases already have raised the same issue, such as the Michigan case cited above and *Nash v. Blunt, supra,* where the three-judge district court decided the issue in a way that conflicts with the court's ruling here. Moreover, this Court has accepted for plenary review, and received briefing and argument in, a case involving much the same issue. *Johnson v. De Grandy,* 61 U.S.L.W. 3580 (Feb. 22, 1993) (probable jurisdiction noted), 62 U.S.L.W. 3317 (Oct. 4, 1993) (oral argument).[12]

2. The district court's second error infects its holding that appellees have shown vote dilution "on account of race" (42 U.S.C. § 1973(a)) in "rural" west Tennessee. In so holding, the court ruled that appellees had properly shown the possibility of a compact majority-black seat in the area through their two proposed alternative plans—drawn largely outside Shelby County, but with a piece of Shelby County added to boost the number of African-American voters. *See* J.S. App. 35a, 36a (maps). Those hypothesized districts, however, follow no traditional districting principles and are inexplicable except on the basis of race. Condemnation of a State's failure to create such a district is inconsistent with a proper understanding of Section 2 and the *Gingles* compactness requirement, especially in light of this Court's decision in *Shaw v. Reno, supra.*

The briefest review of either of appellees' proposed plans shows that the boundaries of the districts cannot

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2 requires denial of equal opportunity not only "to elect representatives" but *also* "to participate in the political process." Influence through sizable numbers is an obvious source of such participation.

[12] If this Court rejects use of statewide figures, and if sufficient proportionality is found as to *all* of southwest Tennessee based on local figures, the second question presented in this jurisdictional statement would not have to be reached. The second issue provides an independent basis for rejecting the claim to an additional "rural" seat.

be explained except on the basis of race. Appellees effectively acknowledged as much as to their first plan (introduced at trial) when, after *Shaw* was decided, they submitted a new plan. That plan, however, is subject to the same defect: it starts with rural Fayette, Hardeman, and Haywood counties, then attaches a predominantly black sliver from the City of Memphis in Shelby County and reaches into a piece of Madison County to add a predominantly black portion of the City of Jackson (Madison's county seat), solely for the purpose of adding enough African-American voters to make up a majority-black district.

It is inconceivable that such districts would be drawn on any basis other than race. Splitting cities and counties, and joining urban to rural areas, the districts respect no traditional boundaries or race-neutral communities of interest: such districts would never be drawn as appellees have drawn them but for the desire to accumulate a sufficient number of African-American voters in a single district. That is particularly true in Tennessee. Such districts violate the strong state policy of respecting the integrity of county boundaries [13]—a policy embodied in

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[13] Article II, Section 6 of the Tennessee Constitution states:

> The number of Senators shall be apportioned by the General Assembly among the several counties or districts substantially according to population, and shall not exceed one-third the number of Representatives. Counties having two or more Senators shall be divided into separate districts. In a district composed of two or more counties, each county shall adjoin at least one other county of such district; and no county shall be divided in forming such a district.

The district court in this case specifically noted the following with respect to that provision (J.S. App. 22a):

> A federal district court has already recognized that Tennessee's policy of preserving county lines is far from "tenuous." In *Murray v. Crowell*, No. 84-0566 (M.D. Tenn. 1985), the court found a number of justifications for the policy: (1) it inhibits political gerrymandering; (2) it reduces voter confusion; (3) it makes representatives more accountable to citizens of a county

the Tennessee Constitution and upheld twice by the Supreme Court of Tennessee.[14] Especially in Tennessee, appellees' proposed alternative districts are inexplicable on any basis other than race.

This sort of hypothesized district cannot satisfy the compactness requirement of *Gingles*. Compactness must mean significantly more than that a district avoid the strange serpentine shape of the district at issue in *Shaw v. Reno*. This Court so indicated in *Growe v. Emison*. The Court said that it was "dubious" that compactness could be found for a district by no means as outlandishly bizarre in shape as the *Shaw* district and no less "compact" than appellees' proposed districts here, explaining simply that the district "stretch[ed] from south Minneapolis, around the downtown area, and then into the northern part of the city *in order to link minority populations*." 113 S. Ct. at 1083, 1085 (emphasis added). As that passage suggests, the compactness requirement, construed in light of its function in the analysis of a vote-dilution claim under Section 2, demands that the proposed district comport with accepted redistricting principles and not be explicable only in terms of race.

In *Gingles*, this Court pointedly did *not* say that proof of political cohesion and racial bloc voting was sufficient

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as a group; (4) it reduces the costs of holding elections and running for office; (5) it provides bright-line clarity to reapportionment law; (6) it enhances the representation of county governments in the state legislature; and (7) it encourages voter participation.

[14] The Tennessee Supreme Court has held that Article II, Section 6 of the Tennessee Constitution, prohibiting the division of counties in forming multi-county Senate districts, must be followed except where it is necessary to attach portions of urban counties to rural counties in order to form multi-county Senate districts in compliance with the requirement of "one person, one vote." *State ex rel. Lockert v. Crowell*, 631 S.W.2d 702, 708 (Tenn. 1982) (*Lockert I*); *State ex rel. Lockert v. Crowell*, 656 S.W.2d 836, 844 (Tenn. 1983) (*Lockert II*).

to establish vote dilution as long as a majority-minority district could, as a matter of pure numbers, be drawn—which, in fact, can *always* be accomplished by simply compiling a list of voters (regardless of residence) and declaring that list to constitute a district. Rejecting that possibility, the Court insisted instead that a proposed district be "compact" before liability could be found. Necessarily, that construction of Section 2 means that States are not required to violate all traditional redistricting principles in order to produce minority electoral success.

The *Gingles* compactness precondition thus gives concrete meaning, reflecting the strong interest of States in control of their own electoral systems (*Voinovich*, 113 S. Ct. at 1156-57; *Growe*, 113 S. Ct. at 1081), to the basic antidiscrimination bar of Section 2. If additional electoral success cannot be achieved without violating traditional districting principles, then any challenged lack of additional representation is not to be attributed to race. The minority group in those circumstances has no less political opportunity than other members of the electorate who are comparably constrained by the State's right to insist on compliance with traditional redistricting principles. *Gingles*, 478 U.S. at 50-51 & nn. 16 & 17. Requiring a State to create a district that juts out to break city and county lines for no reason except race contravenes this fundamental limit on the degree to which, and manner in which, Section 2 overrides state legislative choices.

Even if this principle were not part of the "compactness" requirement of *Gingles* (which we think it is), the principle nevertheless must be part of a proper Section 2 analysis: the rationale behind the Court's adoption of the compactness precondition to liability cannot be artificially limited. The *Gingles* rationale necessarily establishes fundamental limits on the extent to which Section 2's "results" standard displaces the authority of States to adhere to traditional redistricting principles. If a policy of resi-

dential compactness provides an independent legally sufficient reason for refusing to hold that race is the cause of any challenged deficiency in representation, then there is no reason why a State may not more generally refuse to draw districts entirely for reasons of race and insist instead that it will respect traditional redistricting principles.[15] Thus, whether or not located in *Gingles'* compactness requirement, one Section 2 requirement for a showing of vote dilution must be a demonstration that a majority-minority district can be drawn that respects traditional state principles of legislative redistricting. As to their multi-county district, appellees in this case have failed to make such a showing and for that reason have failed to show that their votes are unlawfully diluted by the Senate Plan in southwest Tennessee.

Any other construction of Section 2 would improperly raise constitutional problems.[16] Recently, this Court in *Shaw v. Reno* made clear that a serious constitutional question arises where district lines are drawn in a way that cannot "be explained on grounds other than race" (113 S. Ct. at 2825)—where, for example, a State has "concentrated a dispersed minority population in a single district by disregarding traditional redistricting principles such as compactness, contiguity, and respect for political subdivisions" (*id.* at 2827). Section 2 of the Voting Rights Act should not be construed to *require* a State to create a district that might result in an equal protection violation. For that reason as well, the district court's reli-

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[15] This Court has recognized the significance to Section 2 analysis of the various state interests that go into defining an electoral system. *Houston Lawyers' Ass'n v. Attorney General*, 111 S. Ct. 2376, 2381 (1991).

[16] *See, e.g., Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) (statutes should be construed to avoid constitutional questions); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (same).

ance on appellees' proposed districts, whose boundaries are inexplicable other than on racial grounds, is incorrect.

The ruling should be reviewed (and reversed) by this Court. Especially after *Shaw v. Reno,* the sufficiency of proposed districts drawn solely on the basis of race raises an important question for the litigation of challenges to districting plans. The issue has already been raised in other pending litigation, such as the Michigan and Maryland cases cited above. And the Fourth Circuit, as noted, has specifically relied on *Shaw* to reject a districting plan proposed by plaintiffs in a Section 2 case, explaining that "the *only* motivation for such a districting plan would be racial concerns, *i.e.,* providing blacks with another representative." *Hines,* 998 F.2d at 1274. As also noted above, a three-judge district court in Louisiana has reached a similar conclusion: in holding that a district drawn solely on the basis of race, in disregard of traditional districting principles, violates *Shaw v. Reno,* the court declared that such a district is not compact within the meaning of Section 2. *See Hayes v. Louisiana, supra.* Clarity and consistency on the rules governing this crucial aspect of Section 2 cases are needed.

CONCLUSION

The Court should note probable jurisdiction or, at a minimum, hold this appeal and dispose of it as appropriate in light of its decision in *Johnson v. De Grandy*.

Respectfully submitted,

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Dated: January 7, 1994

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

Civil Action No. 92-2407-TUBRO

Judge Merritt Judge Brown Judge Turner

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, DR. C.T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART and DR. WARREN DICKERSON

Plaintiffs,

v.

NED MCWHERTER, in his official capacity as Governor of the State of Tennessee, JOHN WILDER, in his official capacity as Lieutenant Governor and Speaker of the Tennessee Senate, JAMES NAIFEH, in his official capacity as Speaker of the Tennessee House of Representatives, WILL BURNS, in his official capacity as Coordinator of Elections, and LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAE ESQUE, SPENCE DUPREE, BOBBY WHITE, and LINDA BURNETT, in their official capacities as Registrars of Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby and Tipton Counties

Defendants.

[Filed Nov. 4, 1993]

OPINION OF THREE-JUDGE COURT

Before: MERRITT, Chief Circuit Judge; BROWN, Senior Circuit Judge; TURNER, District Judge.

This is a civil rights case brought under § 2 of the Voting Rights Act, 42 U.S.C. § 1973,[1] and several constitutional provisions. The action challenges Tennessee's 1992 apportionment of its 33 state Senate districts.[2] Tennessee's voting age population is 14.4% black, but in only three of the districts (9.1%) do blacks have a reasonable chance to elect a black-preferred candidate as a state senator. We do not reach the constitutional questions because we find that the plan violates § 2 by afford-

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[1] The Act provides

> (a) No voting qualification . . . shall be imposed . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . (b) A violation of subsection (a) of this section is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section *in that its members have less opportunity than other members of the electorate* to participate in the political process and *to elect representatives of their choice*. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis added).

[2] We do not concern ourselves in this case with the Rural West Tennessee African-American Affairs Council's Voting Rights Act challenge to the reapportionment of [the Tennessee House of Representatives] because our decision in *Langsdon v. Milsaps*, No. 92-2415 (September 15, 1993) declared the House reapportionment bill unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, thereby rendering the House reapportionment issue in this case moot.

ing black voters in west Tennessee less opportunity than other members of the electorate to elect representatives of their choice. The legislature must revise its apportionment of the state senate to provide four majority black districts in order to comply with § 2.

I.

The Tennessee General Assembly consists of a thirty-three member Senate and a ninety-nine member House of Representatives. The state Senate is elected from single-member districts of roughly equal population. Under the 1992 reapportionment plan, three of the thirty-three Senate districts contain a majority-black population. Two of the three majority-black Senate districts are in Shelby County in southwest Tennessee, the third is in the middle of the state in Nashville, Davidson County.

Plaintiffs challenge the effect of the 1992 plan on the voting strength of blacks living in west Tennessee. The evidence presented at trial relates primarily to seven west Tennessee counties: Shelby County (which includes the city of Memphis), and six predominantly rural counties, Tipton, Lauderdale, Haywood, Madison, Fayette, and Hardeman. Plaintiffs contend that black voters in Shelby County are unnecessarily "packed" into the two majority-black districts and that three majority-black districts could easily be created in Shelby County. They also allege that by splitting concentrations of black population in the rural counties into different Senate districts, the 1992 plan dilutes black voting strength.

Under the 1992 plan, there are five Senate districts contained wholly within Shelby County, Districts 28, 29, 30, 31, and 33. Senate District 32 contains part of Shelby County and all of Lauderdale and Tipton Counties. Plaintiffs contend that the two majority-black districts, districts 29 and 33, are "packed" with an excessive number of black voters. District 29 has an 83% black voting-age population, and District 33 has a 69% black voting-

age population. Districts 28 and 30 have black voting-age populations of 31% and 33%, respectively. Plaintiffs have shown that it is possible to redraw these districts so that there are three majority-black Senate districts in Shelby County instead of two. These proposed districts would have black voting-age populations of 60.9%, 60.9%, and 60.0%.

Under the 1992 plan, the six rural counties at issue in this case form parts of three Senate districts, Districts 26, 27, and 32. Plaintiffs contend that the present configuration of these districts unnecessarily fragments concentrations of black population. Districts 26 and 27 both have black voting-age populations of 21%, and District 32, which contains part of Shelby County, has a black voting-age population of 17%. Plaintiffs have shown that by including part of Shelby County it is possible to draw a district in rural west Tennessee with a black voting-age population of more than 55%. Plaintiffs first proposed a rural Senate district which would split the six rural counties and Shelby County. Plaintiffs have shown, however, that it is possible to draw a Senate district with a greater than 55% black voting-age population by splitting only Shelby and Madison counties and by including all of rural Haywood, Fayette, and Hardeman counties.[3]

II.

Plaintiffs allege that by failing to create three majority-black Senate districts in Shelby County and one majority-black Senate district in rural west Tennessee, the State has violated § 2 of the Voting Rights Act by diluting the voting strength of black voters in Tennessee.

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[3] The latter plan presented by the plaintiffs was not proved during trial, but was offered by the plaintiffs in their Motion to Supplement the Record With Alternative Rural West Tennessee Senate District. Since defendants had no opportunity to examine the demographer who prepared the plan, we do not know the defendants' position relative to this plan. Moreover, it appears that this plan splits the city of Jackson in Madison County.

The Voting Rights Act was passed in 1965, and was amended in 1982. The purpose of the 1982 amendment was to "make clear that plaintiffs need not prove a discriminatory purpose in order to establish a violation." *Chisom v. Roemer,* 111 S. Ct. 2354, 2363 n.21 (1991) (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S.C.C.A.N. 177 [hereinafter Senate Report]). The statute thus sets out a "results test." *Thornburg v. Gingles,* 478 U.S. 30, 44 n.8 (1986). A voting procedure violates the Act in this case if it has the "result" under the "totality of the circumstances" of affording black voters less opportunity than white voters "to elect representatives of their choice." 42 U.S.C. § 1973(b).

The Senate Judiciary Report on the 1982 amendment sets out some of the relevant factors to be considered under the totality of the circumstances.[4] The Supreme

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[4] These factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

Court first addressed the 1982 amendment in *Thornburg v. Gingles*, 478 U.S. 30 (1986). In *Gingles*, the Court explained the statutory "totality of the circumstances" test and set out the three "necessary preconditions" of a successful § 2 claim, only the last of which is in dispute in this case:

> 1. The plaintiffs must demonstrate that the protected group is sufficiently large and geographically compact that it could constitute an effective majority in a single-member district.
>
> 2. The plaintiffs must show that the protected group is politically cohesive.
>
> 3. The plaintiffs must show that the majority votes sufficiently as a bloc to enable it usually to defeat the protected group's preferred candidate.

Id. at 50-51. Although *Gingles* involved a challenge to multimember districts, the three *Gingles* elements of a § 2 cause of action apply to challenges to single-member systems as well. *Growe v. Emison*, 507 U.S. ——, 113 S. Ct. 1075, 1084 (1993); *Voinovich v. Quilter*, 113 S. Ct. 1149, 1157 (1993). Once the elements have been established, plaintiffs must still show that under the totality of the circumstances a violation has occurred. *See*

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7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Senate Report at 206-07.

The list is not meant to be exclusive, and there is no requirement that any particular number of factors be established *Armour v. Ohio*, 775 F. Supp. 1044, 1050 (N.D. Ohio 1991).

Jeffers v. Clinton, 730 F. Supp. 196, 209 (E.D. Ark. 1989).

Plaintiffs, as noted, have submitted two different districting plans which would provide two more Senate districts in west Tennessee with black voting-age populations of greater than 55%. Either of plaintiffs' suggestions satisfies the first element of *Gingles*. The second *Gingles* precondition is that the minority community be politically cohesive. *Gingles*, 478 U.S. at 51. This is a question of whether black voters in west Tennessee share a community of interests and tend to vote differently from the majority white population. The parties have stipulated that the African-American communities of rural southwest Tennessee and Shelby County are politically cohesive.

The main dispute in this case concerns the third *Gingles* factor: whether the white majority votes sufficiently as a bloc to enable it usually to defeat the black minority's preferred candidate. The focus of the dispute is the definition of "preferred candidate." Plaintiffs contend that when there is no black candidate in a race there is no way to be sure that the candidate who receives the most black votes is the "true" candidate of choice and not simply the "lesser of two evils." They therefore rely solely upon West Tennessee state legislative elections in which there is at least one black and one white candidate.[5] The State relies instead upon all West Tennessee

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[5] Both parties employed "ecological regression analysis" to estimate the actual voting behavior of black and white voters. This statistical technique is standard in the field and has been accepted by numerous courts including the Supreme Court in *Gingles*, 478 U.S. at 53-61. Both parties also examined elections other than those for the state legislature. Because the results in these "exogenous" elections are consistent with the results in the state legislative elections, and because state legislative elections are the most relevant to our inquiry, we rely solely upon the evidence of voting behavior in the state legislative contests. *C.f. Brown v. Board of*

state legislative elections since 1986 for which election data is available, regardless of whether there is a black candidate in the race. The State concedes that "black-white" elections are more relevant to our inquiry than are "white-white" elections, but proposes to control for the difference by weighing elections based upon black voter turnout. It argues that if blacks do not have a strong preference in a white-white election, black voter turnout should be expected to drop and the election should be given correspondingly less weight.

Under plaintiffs' analysis it is clear that white bloc voting usually works to defeat the black preferred candidate in white majority districts. Plaintiffs' expert, Stephen Cole, analyzed seven state legislative elections in rural west Tennessee and eight in Shelby County. In six of the seven rural county elections there was voter polarization based upon race, and in five of the elections the level of polarization was overwhelming. White support of black candidates was particularly low, with only one black candidate receiving more than 10% of the white vote. No black candidate won any of the state legislative elections held in rural west Tennessee.

Black candidates in Shelby County were more successful, winning four of the eight recent black-white contests for state legislative office. Blacks were able to win, however, only in majority-black districts, and in only one election did a black candidate win even a bare majority of the white vote. The overall level of racially polarized voting in Shelby County is comparable to that in the rural counties. To give some idea of the level of white bloc voting in west Tennessee it is interesting to compare the fifteen black-white elections in this case to the thirty-seven black-white elections considered in *Gingles*. In the

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Comm'rs of Chattanooga, 722 F.Supp. 380, 390-91 (E.D. Tenn. 1989) (relying on the results of previous city elections as most relevant in a Voting Rights Act challenge to the city electoral system).

North Carolina state legislative races analyzed in *Gingles*, black candidates received an average of 31.62% of the white vote. In the fifteen elections analyzed by the plaintiffs in this case, black candidates received an average of only 9.07% of the white vote. Based solely upon the black-white state legislative elections in west Tennessee, then, we find a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice.

The State's analysis of black voter turnout does not significantly affect this conclusion. The State's expert witnesses, Michael M. Gant and William Lyons, proposed to measure the importance of white-white elections to black voters by comparing black voter turnout in white-white elections to turnout in black-white elections. They looked at all elections in which black voters and white voters preferred different candidates and in which the voting-age population was between 25% and 50% black. The State's rationale for limiting the analysis to elections in districts with a 25% to 50% black voting-age population was that (1) in districts with a voting-age population less than 25% black, the chance of a black candidate succeeding is so low that black turnout may suffer for reasons unrelated to the race of the candidates; and (2) in districts with a voting-age population greater than 50% black the black-preferred candidate is virtually assured victory. In the nineteen elections which met the State's criteria, black turnout was 24% in white-white elections and 28% in black-white elections. The State therefore concludes that black voters are almost as interested in white-white elections as in black-white elections, and so white-white elections should be given almost as much weight under the third *Gingles* factor as black-white elections.

While we agree with the State that black voter turnout is relevant to the question whether the black-preferred candidate in a white-white election is the "true" candidate

of choice of the black community, we do not think it is the only, or even most important, consideration. First, voter turnout in state legislative elections is influenced primarily by the nature of other elections taking place at the same time and secondarily by the weather. *See Rainbow Coalition of Oklahoma v. Oklahoma State Election Board,* 844 F.2d 740, 742 (10th Cir. 1988) (stating that it is "undisputed" that in Oklahoma, where gubernatorial and presidential elections alternate every two years, voter turnout is consistently higher during presidential elections); Burnham, *The Turnout Problem,* in Elections American Style 97, 113-14 (A.J. Reichley ed. 1987) (noting that voter turnout increases during presidential election years); Briffault, *Our Localism: Part II—Localism and Legal Theory,* 90 Colum. L. Rev. 346, 397-98 (1990) (same); Sam Howe Verhovek, *New York Democrats' Hopes Tied to Clinton Coattail Effect,* N.Y. Times, Nov. 3, 1992, at A1 (calling weather conditions "[o]ne of the classic vagaries behind voting patterns"). Second, to the extent voter turnout is affected by local elections, black voter turnout measures only the general level of interest in the election outcome, not necessarily the absolute level of support in the black community for the black-preferred candidate. For instance, in some white-white elections, blacks may turn out in high numbers to defeat a particularly disfavored candidate. We therefore reject the State's contention that white-white elections are almost as relevant to our inquiry as are black-white elections.

Other district courts in the Sixth Circuit have also taken the position that black-white elections should be given more weight than white-white elections. In *Buchanan v. City of Jackson,* 683 F. Supp. 1515, 1529 (W.D. Tenn. 1988), the court held that "the court may consider all elections in determining whether members of a minority have less opportunity than other members of the electorate to elect representatives of their choice . . . That is not to say, however, that all elections must be

given equal weight." The court concluded that "elections in which there was a black candidate are more probative." *Id.* at 1531. *See also Mallory v. Eyrich*, 707 F. Supp. 947, 952 (S.D. Ohio 1989). Although the plurality opinion in *Gingles* states that "it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important," 478 U.S. at 68, the *Gingles* Court upheld a decision based solely upon an analysis of black-white elections. *See id.* at 80-82; *see also, Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989) (noting that no Justice in *Gingles* considered "evidence of elections in which only whites were candidates"); *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988) ("*Gingles* itself looked only to elections where Black candidates were running."). The *Gingles* Court also stated that in determining the appropriate number of elections to study when analyzing racially polarized voting, "[o]ne important circumstance is the number of elections in which the minority group has sponsored candidates." *Gingles*, 478 U.S. at 57 n.25.

The weight to be given to white-white elections is best determined on a case-by-case basis. *See City of Jackson*, 683 F. Supp. at 1531 (relying upon "elections analyzed in this case and the circumstances surrounding those elections" to determine that races involving black candidates were more probative). The facts of this case persuade us that we should rely primarily upon the black-white elections. The evidence showed that one reason many elections did not involve a black candidate is that black candidates are discouraged from running in majority-white districts. Several plaintiffs, members of the Rural West Tennessee African-American Affairs Committee and black community leaders, testified that they have tried to recruit qualified blacks to run for elective office and found it difficult. This testimony was corroborated by the findings of one of plaintiffs' expert witnesses, Richard Couto. One

reason blacks are discouraged from running is that they often see a black candidacy in a majority-white district as a futile gesture. There is a perception in the black community that black candidates cannot expect to receive much white support in the form of votes or fundraising.

Historical discrimination against blacks in west Tennessee has also contributed to the perceived futility of black candidacies in majority-white districts. Plaintiffs presented proof that blacks in west Tennessee have about half the per capita income of whites and three times the level of poverty. Lower economic status inhibits the ability of potential black candidates to raise funds in the black community. Historical black political disenfranchisement also limits potential black electoral success. Perhaps most important of all, because black candidates have not been elected in the past, they are not now in a position to enjoy the benefits of incumbency and political sponsorship which come with being part of the political mainstream. It would not make sense to allow data from white-white elections in majority-white districts, in which potential black candidates viewed black candidacies as futile, to overcome evidence of white bloc voting in black-white elections in districts in which black candidates felt they stood a fighting chance.

We are inclined to give less weight to white-white elections in which black and white voters preferred the same candidate because many of those contests were landslides in which a strong incumbent faced only token opposition. *Gingles* recognizes the legitimacy of such considerations: "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of *special circumstances*, such as the minority candidate running unopposed, . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51 (emphasis added, citation omitted). "Special circumstances include" the absence of an opponent, *incumbency*, or the utilization of bullet voting." *Id.* at 57 (emphasis

added). Of the twenty-seven non-polarized elections analyzed by the State, the average margin of victory of the winning candidate was 41.23%. In fourteen of the elections, over half, the winning candidate received more than 70% of the total vote. These statistics indicate to this Court that black voters and white voters often prefer the same candidate because there is only one viable candidate.

We also are unimpressed by the State's demonstration that, of the thirty-two state legislative contests in which voting was racially polarized, the black-preferred candidate won fourteen, almost half. The character of the elections in which black-preferred candidates defeat white-preferred candidates is very different from those in which white-preferred candidates defeat black-preferred candidates. In white-white elections in which black-preferred candidates prevail against white voter opposition, the black vote acts as a decisive swing vote in elections over which the white community is closely split. We have no evidence whether any candidates in white-white elections were sponsored by the black community. *See also, West Wago Citizens v. City of West Wago*, 946 F.2d 1109, 1119-20 n.15 (5th Cir. 1991) (concluding that black support for white candidates in an all white field tells little about white bloc voting). Like the court in *Jeffers*, we recognize that the power to influence close elections between white candidates is an important aspect of political power, but the principle seems to be that in majority-white districts, "candidates favored by blacks can win, but only if the candidates are white." *Jeffers v. Clinton*, 730 F. Supp. 196, 209 (E.D. Ark. 1989) (quoting *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988)). Racially polarized black-white elections are of a different character. In these elections the black-preferred candidate receives strong black support, 86.30% on the average, but this vote is overwhelmed by white bloc voting averaging more than 90%.

Based upon all of the evidence we find that in Tennessee black-white elections are more probative of racial bloc

voting than are white-white elections, and that the black-white elections indicate white bloc voting which usually enables the majority to defeat the black community's candidate of choice. All three of the *Gingles* preconditions have therefore been met. We next move to a consideration of the "totality of the circumstances."

III.

Section 2 of the Voting Rights Act requires us to examine the "totality of the circumstances" to determine whether the challenged electoral practice, the 1992 redistricting plan, gives west Tennessee black voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." We begin with the list of factors set out in the Senate Report on the 1982 amendment. *See supra*, note 3. We have already addressed the second listed Senate factor, racially polarized voting, and have found strong evidence of polarization, especially in black-white elections. Under the third Senate factor (leaving aside the challenged redistricting plan) we find no evidence of discriminatory voting practices or procedures—such as "unusually large election districts, majority vote requirements, anti-single shot provisions"—in recent state legislative elections. There is also no evidence of a discriminatory slating process, the fourth Senate factor. Candidates for state legislative offices are selected through an open primary system.

We now turn to the Senate factors that warrant greater attention.

A. History of Official Discrimination in Voting.

There is no doubt that Tennessee has a long history of official racial discrimination in voting. Although the worst discrimination is in the past, effects of past discrimination are still apparent and there remains some evidence of official discrimination in the last 15 years.

The history of official discrimination against blacks in Tennessee begins, of course, with the officially sanctioned institution of slavery prior to the Civil War. Despite the existence of slavery, free black men could and did vote in Tennessee until 1834, when the Tennessee Constitution was changed to deny the vote to all blacks. In 1867, during Reconstruction, suffrage was extended once again to black males, and black candidates enjoyed some electoral success. With the end of Reconstruction, however, and the beginning of the Jim Crow era, black citizens were once again effectively disenfranchised. In 1889 and 1890 the state legislature passed voting regulations requiring voter registration; separate ballot boxes for local, state and national elections; single, non-partisan ballots; and a poll tax. These laws had the primary purpose and effect of reducing black political participation.

More recently, the political gains by black citizens during the civil rights movement of the 1950's and 60's were accompanied by increased official discrimination in voting. Government officials manipulated voter registration requirements to discourage black voters, and supported or initiated physical and economic intimidation of those blacks who did manage to register. The strongest example of economic intimidation was the eviction of more than 400 black sharecropping families, most of them in Fayette County, after the 1960 election. These evictions were made possible by registrars who would inform sheriffs of the names of blacks who had registered to vote; the sheriffs would then inform white landowners who would evict black tenants who had registered. These mass evictions led to the formation of two "tent cities" for displaced sharecroppers, one in Fayette County and one in Haywood County. The tent cities became national symbols of the struggle of west Tennessee blacks for equal access to the polls.

Although overt official discrimination against black voters has declined significantly since the 1960's, at least one

federal court has found evidence of intentional discrimination against black candidates and voters in west Tennessee. In *Taylor v. Haywood County,* 544 F. Supp. 1122 (W.D. Tenn. 1982), the district court enjoined Haywood County from changing its Board of Highway Commissioners election system from district elections to a county-wide at-large election. The court found that the change in the number of districts from 10 to 9, which necessitated the change to an at-large election scheme, was "a result of the purposeful intention to dilute black voting strength in Haywood County, Tennessee." *Id.* at 1131. In Hardeman County in 1983 a lawsuit was filed against the City of Bolivar challenging an amendment to the City Charter providing for a mayoral runoff election if no mayoral candidate received a majority of the votes. *Bills v. Alexander,* Civ. Act. No. 83-1220 (W.D. Tenn.). The plaintiffs alleged that the City had amended its Charter in response to the success of two black candidates for mayor in 1981. The district court approved a class action settlement setting up a new "system which will ensure the opportunity of black citizens of Bolivar to meaningfully participate in the political process." These cases challenging newly adopted election systems indicate to the court that official discrimination against blacks in voting is not entirely a thing of the past in west Tennessee.

The State acknowledges Tennessee's history of officially sanctioned racial discrimination in voting and the judicial findings of discriminatory practices in local and county elections. The State argues, however, that these facts are not particularly relevant to present-day state legislative elections. We reject this conclusion for two reasons. First, past discrimination, especially that which took place during the civil rights movement, affects present-day politics. It has had a psychological effect upon black citizens who lived through it, creating in some a lingering sense of disillusionment, frustration, and mistrust. That government officials acted to prevent blacks from fully participating in the electoral process in the 1950s and 60s also

means that today there are few entrenched and powerful black elected officials from that era. There is no tradition of black electoral success. Second, city and county elective offices are often stepping stones to seats in the General Assembly. Success in these elections can provide experience, credibility, and a political powerbase to potential candidates for the state legislature.

There is no evidence that the defendants, Governor McWherter, Lieutenant-Governor Wilder, Speaker Naifeh, State Election Coordinator Burns, or the county Registrars-at-large, have engaged in any intentional discrimination against black voters. In fact, the testimony of several of the defendants demonstrated sensitivity to the needs of black voters. Nevertheless, we find that in west Tennessee there is a history of official discrimination against blacks in voting which has present-day effects, and that official discrimination in voting is not entirely in the past. Official discrimination, past and present, can increase the effect of vote-diluting district lines.

B. Effects of Discrimination in Such Areas as Education, Employment, and Health.

In west Tennessee, black citizens are more likely than white citizens to live in poverty, to be unemployed, and to live in substandard housing. Black citizens are less likely to have completed high school, to own their own homes, to have access to a car, or to have telephones in their homes. As the Senate Report recognizes, educational and economic disadvantages can translate into political disadvantage.

C. Racial Appeals in Campaigns.

Plaintiffs presented little evidence of overt racial appeals in campaigns. Their expert witness, Richard Couto, concluded that "[r]acial harangues are unnecessary when there is white hegemony." Plaintiffs placed more em-

phasis upon the reluctance of white citizens to publicly support black candidacies because of fear of retaliation. There was credible testimony that white supporters of black candidates are often unwilling to display bumper-stickers or yard signs or to otherwise publicly announce their support. Overall, though, the evidence does not support a conclusion that white candidates for elective office in west Tennessee have overtly acted to make race a campaign issue.

D. Electoral Success of Black Candidates.

Section 2 of the Voting Rights Act states that "[t]he extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" under the "totality of the circumstances." 42 U.S.C. § 1973(b). The Senate Report also lists minority electoral success as a "relevant factor." Senate Report at 29. The statute states further that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Nevertheless, based upon the evidence presented at trial, we find that the lack of black electoral success in Tennessee is a factor which weighs in favor of a finding of vote dilution.

The State argues that we should confine our analysis of black electoral success to the region of the state at issue, west Tennessee. We agree instead with the plaintiffs' position that the proper scope of our review is the entire state. Although plaintiffs have challenged only the effect of the 1992 redistricting plan upon west Tennessee, what is really at issue is the entire plan. This conclusion is mandated by the language of the statute itself: "The extent to which members of a protected class have been elected to office in the *State or political subdivision* is one circumstance which may be considered." 42 U.S.C. § 1973 (b) (emphasis added).

The statutory authority to consider minority electoral success pertains to the issue of whether the minority within the applicable jurisdiction, in this case the state, suffers from vote dilution. If black electoral success statewide was sufficient to elect more black candidates percentage-wise than their population in the state, it would be difficult, if not impossible, to conclude that the district lines resulted in minority vote dilution in violation of § 2.

We agree with the State, however, that the statute uses the word "electorate" and that we should measure the proportionality of black representation on the basis of black voting age population (the "electorate") rather than total black population. Blacks represent a higher percentage of the total population than of the voting-age population. The plaintiffs urge that the language of the 1982 amendment to the Act—"nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion *in the population," id.* (emphasis added)—supports a conclusion that total population should be used. Plaintiff's also point to the statement in the Senate Report that "[t]he principle that the right to vote is denied or abridged by dilution of voting strength derives from the one person, one vote reapportionment case of *Reynolds v. Sims.*" Senate Report at 19. *Reynolds* noted that "one person" does not mean "one voter," it means one member of the population. *Reynolds v. Sims,* 377 U.S. 533, 60-61 (1964). *Reynolds,* however, is concerned with ensuring that each district incorporates the same number of people so that the voting strength of an individual does not vary by virtue of the location of his or her residence. The language quoted from *Reynolds* is not related to the redrawing of district lines on the basis of demographic factors and thus is not relevant in this case. *See Beer v. United States,* 425, U.S. 130, 142, n.14 (stating that "the many cases . . . involving the Fourteenth Amendment's one man, one vote standard are not relevant in a case involving redistricting"). The goal of § 2 of the Act is to protect the

voting strength of minority groups, which is more accurately reflected by voting-age population than by total population. The Supreme Court has noted the prevalence of this standard with approval. *See, e.g., Growe v. Emison,* 507 U.S. ——, 113 S. Ct. 1075, 1079; U.S. Lexis 1780 (1993) at 25 (noting that "to establish whether a § 2 violation has occurred . . . courts have looked to, not the district's total minority population, but the district's minority population of voting age" and citing *Romero v. Pomona,* 883 F.2d 1418, 1425-1426, and n.13 (9th Cir. 1989) (citing cases) and *Gingles* 478 U.S. at 48, 50).

The voting-age population in Tennessee is 14.4% black. The General Assembly's 1992 reapportionment plan has the same number of majority-black districts as did the previous plan, three out of thirty-three. It has been demonstrated that black candidates cannot expect to succeed in majority-white districts. To our knowledge, no black from a majority-white district has won a seat in the state Senate this century. Under the new plan, then, blacks can expect to hold 9.1% of the Senate seats, the same percentage blacks now hold. Four majority-black districts would be 12.1% of the Senate districts, slightly below the voting-age population of 14.4%; five of thirty-three districts would be 15.2%, slighly above the black voting-age population. We recognize that the level of black electoral success is merely a factor to be considered, and that blacks are not guaranteed proportional representation by § 2. With this caveat in mind, we find that the level of black electoral success in the state Senate indicates that the Senate reapportionment plan will result in minority vote dilution.

E. Responsiveness of Elected Officials.

Plaintiffs have disavowed any attempt to prove that state elected officials are unresponsive to their black constituents. Plaintiffs filed a motion in limine to preclude the defendants from offering testimony on the responsive-

ness of elected officials. We declined to forbid all such testimony, holding that responsiveness is relevant to intent under plaintiffs' constitutional claims, and relevant to the § 2 claim under the "totality of the circumstances." We did, however, limit evidence to the responsiveness of the General Assembly as a whole, rather than the responsiveness of individual legislators, because the actions of particular officeholders are not at issue.

The State presented evidence that the General Assembly is responsive to the black community in west Tennessee. White legislators with large black constituencies campaign hard in the black community, are often endorsed by black organizations, and often receive strong black support at election time. Lieutenant-Governor Wilder,[6] state Senator from District 26 and Speaker of the Senate, provided a long list of measures passed by the General Assembly aimed primarily at helping the black community. On the other hand, some of the plaintiffs, citing specific examples of neglect, testified they did not feel that the General Assembly is as responsive to black citizens as to white citizens.

There is some merit to both sides of this dispute. In the political process it is impossible to please everyone; from time to time interest groups and constituencies will feel slighted despite what legislators feel are their best efforts to be fair to everyone. *See Jeffers,* 730 F. Supp. at 213 ("There is bound to be some public dissatisfaction, among blacks as well as whites, with almost any office holder[.]"). Such differences of opinion are difficult for this Court to resolve. The House Report on the 1982 amendment recognized this problem when it praised the amendment for avoiding "highly subjective factors such [as] responsiveness of elected officials to the minor-

[6] Because Tennessee law provides that the Speaker of the Senate shall succeed the Governor, the Speaker of the Senate is referred to as the Lieutenant-Governor even though he has no duties in the State's executive branch.

ity community." Senate Report at 27, 24 (quoting H. Rep. No. 97-227, 97th Cong., 1st Sess., at 30). Although we believe that under the totality of the circumstances the legislature's responsiveness to the black community may be considered, the evidence before us is equivocal. We do not, therefore, place much weight upon this factor.

F. State Policy Underlying Redistricting Plan.

An "additional factor[] that in some cases ha[s] had probative value as part of plaintiffs' evidence to establish a violation" is "whether the policy underlying the state or political subdivision's use of [the challenged voting procedure] is tenuous." Senate Report at 29. The primary policy asserted by the state in retaining the present reapportionment plan is the state's constitutional policy of preserving the integrity of county lines. The Tennessee Constitution, Article II, Section 6, provides that, in apportioning Senate districts, "no county shall be divided in forming such a district."[7] A federal district court has already recognized that Tennessee's policy of preserving county lines is far from "tenuous." In *Murray v. Crowell,* No. 84-0566 (M.D. Tenn. 1985), the court found a number of justifications for the policy: (1) it inhibits political gerrymandering; (2) it reduces voter confusion; (3) it makes representatives more accountable to citizens of a county as a group; (4) it reduces the costs of holding elections and running for office; (5) it provides bright-line clarity to reapportionment law; (6) it enhances the representation of county governments in the state legislature; and (7) it encourages voter participation.

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[7] The Tennessee Supreme Court has recognized that this prohibition must yield to the requirements of § 2 if there is a conflict. *State ex rel. Lockert v. Crowell,* 631 S.W. 2d 702, 708-09 (Tenn. 1982); *State ex rel. Lockert v. Crowell,* 656 S.W. 2d 836, 843 (Tenn. 1983).

The Supreme Court has indicated that, not only must a court determine that the state's interest in a challenged voting procedure is not "tenuous," it must also consider whether the state's interest is compelling. In *Houston Lawyers' Ass'n v. Attorney General of Texas,* 111 S. Ct. 2376 (1991), the Court stated that "the State's interest in maintaining an electoral system . . . is a legitimate factor to be considered among the 'totality of the circumstances' in determining whether a § 2 violation has occurred." *Id.* at 2381. Since *Houston Lawyers,* a number of district courts have examined the state's interest in its electoral system under the totality of the circumstances. *See Nipper v. Chiles,* 795 F. Supp. 1525, 1532 (M.D. Fla. 1992); *Magnolia Bar Ass'n v. Lee,* 793 F. Supp. 1386, 1412 (S.D. Miss. 1992); *Southern Christian Leadership Conf. v. Evans,* 785 F. Supp. 1469, 1478-80 (M.D. Ala. 1992); *Clark v. Roemer,* 777 F. Supp. 471, 479 (M.D. La. 1991).

There are some practical problems with weighing state interests under the totality of the circumstances test. First, § 2 is concerned with "results," specifically the ability of minority groups to elect representatives of their choice. *See Gingles,* 478 U.S. at 44 and n.8 (stating that the Senate Report makes clear that § 2 imposes a "results test"). Consideration of a state's interests in adopting a challenged electoral system is more appropriate under the "intent" test rejected by Congress. *Id.* (citing Senate Report). As the Fifth Circuit observed:

> Because the state interests would not be a signal of dilution like the other Section 2 factors (including the tenuousness of the state interests), a court analyzing a Section 2 claim under the proposed balancing framework would no longer ask only whether, under the totality of the circumstances, there is an unequal opportunity to participate in the political process. The court would also ask whether, in light of the state interest, the unequal opportunity to

> participate is sufficiently unequal to support a finding of liability under Section 2. In other words, the state interests would have to be weighed *against* proven vote dilution. The problem with such a framework, from a district court's perspective, is the lack of standards for such an approach.

League of United Latin American Citizens v. Clements, 986 F.2d 728, 763 (5th Cir. 1993), *on remand from Houston Lawyers,* 111 S. Ct. 2376 (citations omitted).

The second practical problem is that the state's interests in an electoral scheme are only relevant to the extent that those interests are compromised by a possible § 2 remedy. *See id.* at 763-64. When potential remedies do not impinge on the state's interests those interests need not be considered. We have before us only two of the numerous possible remedies, both of which were presented by the plaintiffs. The first plan was presented primarily to demonstrate that the first *Gingles* precondition can be met. The second plan was submitted in response to concerns expressed by the court and the State that plaintiffs' plan ignored "traditional districting principles." *Shaw v. Reno,* —— U.S. ——; 113 S. Ct. 2816, 2824 (1993). Specifically, one of the proposed majority-black districts split six counties. Plaintiffs' second plan demonstrated that a second district could be created by splitting only Shelby and Madison Counties. Under the current plan, some counties are split in forming Senate districts, but no district splits more than one county.

G. "Influence" Districts vs. Majority-Minority Districts

The State mounts a strong additional argument under § 2 of the Voting Rights Act that, although the creation of one or more majority black districts in west Tennessee would likely increase the number of black state senators, such a change may well reduce the overall influence of black voters in the State Senate. The State's argument is that it is better under § 2 for minority voters to have

their influence spread widely than to be able to control a few districts.

Senator Steve Cohen, a white state senator from Memphis whose district would become majority black under the plaintiffs' redistricting proposal, testified that the actual influence of black voters would be reduced because the black voters in one or more adjacent majority white districts would have to be removed and placed in his district, thereby reducing the broader influence of black voters in several districts. He gave as an example of the reduced influence the legislative proposal to make the birthday of Martin Luther King a state holiday, a bill which passed in the State Senate by only one vote (17 to 16). Senator Cohen voted for the bill, and another white Senator in an adjacent Shelby County district also voted for the bill. The thrust of Senator Cohen's testimony was that by removing black votes from the adjacent majority white district in order to make a black majority district, at least one more conservative white Senator would probably be elected, a Senator who would be uninfluenced by black voters and would have been inclined to vote against the King birthday bill, a symbolic measure strongly favored by black voters but opposed by many white voters in west Tennessee.

Conceptually it may be true, at least in some instances, that black influence in the legislative process on a statewide basis could be reduced by the creation of one or more additional majority black districts. Black voters may join like-minded white voters to elect a white representative favorable to black interests. By spreading the black vote out in several districts, the influence of black voters, but not their visible black representation, may be enhanced.

The § 2 legal question which underlies this debate is this: When a choice is between two or more black "influence" districts, most likely represented by whites, versus one majority black district represented by a black,

what does § 2 require in geographical areas of racially poliarized block voting with a history of prior racial discrimination? Although this question of interpretation is latent in several voting rights cases, the courts have not expressly decided it. In *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), where this question was just below the surface, the opinion by Judge Richard Arnold ordered the creation of additional majority black districts, holding by implication that visible black representation should trump black influence districts in the circumstances of that case. In *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), the Supreme Court alluded to the question but did not reach it because the district court had found that voting was not racially polarized.[8] Even so, in *Voinovich* the Court allowed an Ohio legislative apportionment plan which packed a super majority of black voters into districts in order to create visible black representation. Some political scientists have referred to this practice as "political ghettoization," in which "black voters are concentrated in a handful of majority-black districts, with little or no influence in the remaining districts." Grofman & Davidson, *Postscript: What Is the Best Route to a Color-Blind Society* in Controversies in Minority Voting: The Voting Rights Act in Perspective, 300, 312 (1992).

The Supreme Court has made racially polarized block voting in areas where a majority-minority district is possible the central focus of § 2 jurisprudence. In *Gingles*

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[8] The Court observed:

> On the one hand, creating majority-black districts necessarily leaves fewer blacks voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of majority-black districts can enhance the influence of black voters. Placing black voters in a district in which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidates of choice.

113 S. Ct. at 1156.

this method of framing the issue suggests strongly that the creation of majority black districts is the normal remedy for a § 2 violation. This focus led Justice O'Connor in her concurring opinion in *Gingles* to ask: "Is the 'voting strength' of a racial group to be assessed solely with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group?" 478 U.S. at 88.

Section 2 seems to answer this question. Whatever may be the wisdom of the Congressional policy, it appears that the language of § 2 and its legislative purposes strongly favor the creation of majority black districts and visible black representation, instead of "influence" districts, when block voting is racially polarized and there is a history of racial discrimination. The language of the statute creates a "results" test and states that districts should be created in which racial minorities have an "opportunity . . . to elect representatives of their choice." The evidence in the present case, as in many cases, shows that blacks prefer to elect black representatives when they have a choice. The Senate report explaining the language of § 2 says "the presence of minority elected officials is a recognized indicator of access" to the political process under the "results" test. Senate Report at 193. It also says that "the extent to which members of the minority group have been elected to public office in the jurisdiction" in question is a major factor in determining a violation of § 2. Senate report at 206-7. In light of this language, it appears that § 2 opts in favor of visible black representation over other forms of political influence when racial block voting and a history of prior racial discrimination are present, as here. In such instances, § 2 as we interpret it opts for black control of some districts rather than spreading out black "influence" in more districts likely to be represented by white elected officials.

H. Totality of the Circumstances.

When all of the relevant factors are considered, it is clear that the 1992 Senate reapportionment plan violates § 2 of the Voting Rights Act. Plaintiffs have presented strong evidence of racially polarized voting, the most important factor. The state's history of official discrimination in voting, and the lingering effects of discrimination upon the educational and economic status of black citizens of west Tennessee, also weigh in favor of the finding of vote dilution. These factors have all contributed to black candidates' lack of electoral success in west Tennessee. The only factor which clearly weighs in favor of the State is the State's interest in preserving the integrity of county lines. Consequently, we find that under the totality of the circumstances the 1992 Senate reapportionment plan violates § 2 of the Voting Rights Act by affording black voters in west Tennessee less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

IV.

Having found a violation we must address the remedy. To begin, we enjoined the State from conducting any more elections under the 1992 redistricting plan contained in Chapter 826 of the Public Acts of 1992. The State is ordered to submit a new plan which complies with the Voting Rights Act. The Supreme Court has "repeatedly held that redistricting and reapportioning legislative bodies is a legislative task, which the federal court should make every effort not to preempt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). We also ask plaintiffs to submit alternative plans. We assume that the State will consider the views of the plaintiffs and all other interested parties when drawing a new plan.

The Senate Report indicates that "the remedy fashioned must be commensurate with the right that has been violated . . . so that it completely remedies the prior dilution

of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." Senate Report at 31. Although other courts have referred to the Senate Report standard in fashioning a remedy, *e.g., Brown,* 722 F. Supp. at 400, the standard does not provide much guidance. We reject the contention that a "complete and full" remedy means drawing districts to achieve maximum possible black representation in the legislature. The explicit rejection in the text of the statute of any right to *proportional* representation indicates that Congress did not intend to require *maximum* representation. *See Burton v. Shehan,* 794 F. Supp. 1329 (D.S.C. 1992); *Turner v. Arkansas,* 784 F. Supp. 553, 557 (E.D. Ark. 1991). The evidence before us indicates that one more majority-black Senate district must be drawn in west Tennessee. A second majority black district would provide slightly more representation than the state's black voting age population require. It would create five black Senate districts in the state or more than 15% of the districts when the black voting age population is 14.4%. The issue of creating a fifth black Senate district should be left to the political judgment of the legislature. It is not required by federal law.

The State may not justify a failure to draw an additional majority-black district based upon the State's assertions at trial that an "effective" majority-black district should contain a black voting-age population of at least 65%. The 65% figure is a guideline devised by the Department of Justice to compensate for minority communities' usually lower voting-age population, lower voter registration, and lower voter turnout. The figure represents a baseline of 50% to which 5% is added for each factor listed above. *See Ketchum v. Byrne,* 740 F.2d 1398, 1415 (7th Cir. 1984). New information and changing circumstances justify reexamination of the 65% standard. *Neal v. Coleburn,* 689 F. Supp. 1426, 1438 (E.D. Va. 1988). If the

State uses voting-age population instead of general population, there is obviously no need to add 5% for lower average voting-age population. Further, the State's voter turnout figures show that black voter turnout in majority-black districts in west Tennessee is higher than white turnout. These figures alone indicate that a district with a 55% black voting-age population would be an "effective" majority-black district. We agree with the statement in *Puerto Rican Legal Defense and Educ. Fund v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992), that there is "no bright line rule for discerning an appropriate VAP [voting-age population] level within a district that passes Voting Rights Act muster."

The legislature should prepare and submit a new plan by January 25, 1994, the same deadline set in our previous opinion dealing with the House of Representatives filed September 15, 1993, as amended on October 5, 1993. We are confident defendants will be able to meet the deadline we have imposed.

Accordingly, it is so ORDERED this 4th day of November, 1993.

ENTERED BY ORDER OF THE COURT

/s/ Gilbert S. Merritt
GILBERT S. MERRITT
United States Chief Circuit Judge

/s/ Bailey Brown
BAILEY BROWN
United States Senior Circuit Judge

/s/ Jerome Turner
JEROME TURNER
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIV. 92-2407-TUBRO

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,
Plaintiffs

v.

NED R. MCWHERTER, Governor of the State of Tennessee, *et al.*,
Defendants

[Filed Nov. 29, 1993]

Before: MERRITT, Chief Circuit Judge; BROWN, Senior Circuit Judge; and TURNER, District Judge

Plaintiffs, Rural West Tennessee African-American Affairs Council, have moved the court to alter or amend its previous decision in this case. The grounds for the motion are that total population, rather than voting age population, should be the measure for determining minority voting strength in connection with a remedial plan for the State Senate.

The court declines to so alter or amend its opinion in this case. It therefore denies the motion. The statute under which plaintiffs bring this action, 42 U.S.C. § 1973 (b) says that "a violation" occurs when minority "members have less opportunity than other members of the

electorate to participate in the political process . . . ." (emphasis added). The court believes itself to be bound by the use of the word "electorate" in the statute which the court is interpreting. The court understands the word "electorate" to mean voting age population according to the census figures, not total population.

Accordingly, it is so ORDERED this 29th day of November, 1993.

ENTERED BY ORDER OF THE COURT

/s/ Gilbert S. Merritt
GILBERT S. MERRITT
United States Chief Circuit Judge

/s/ Bailey Brown
BAILEY BROWN
United States Senior Circuit Judge

/s/ Jerome Turner
JEROME TURNER
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 92-2407-TU

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, C.T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART and WARREN DICKERSON,

Plaintiffs,

v.

NED R. MCWHERTER, Governor of the State of Tennessee; JOHN WILDER, JAMES NAIFEH, WILL BURNS, LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAE ESCUE, SPENCE DUPREE, BOBBIE WHITE and LINDA BURNETT,

Defendants.

[Filed Dec. 17, 1993]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the defendants, Ned R. McWherter, John Wilder, James Naifeh, Will Burns, Lenita McGraw, Janet Black, Judy Bishop, Ella Mae Escue, Spence Dupree, Bobbie White and Linda Burnett, hereby appeal to the Supreme Court of the United States from the Order of the three judge court dated November

4, 1993, and also appeal from the order of the three judge court denying the plaintiffs' motion to alter or amend dated November 29, 1993.

Respectfully submitted,

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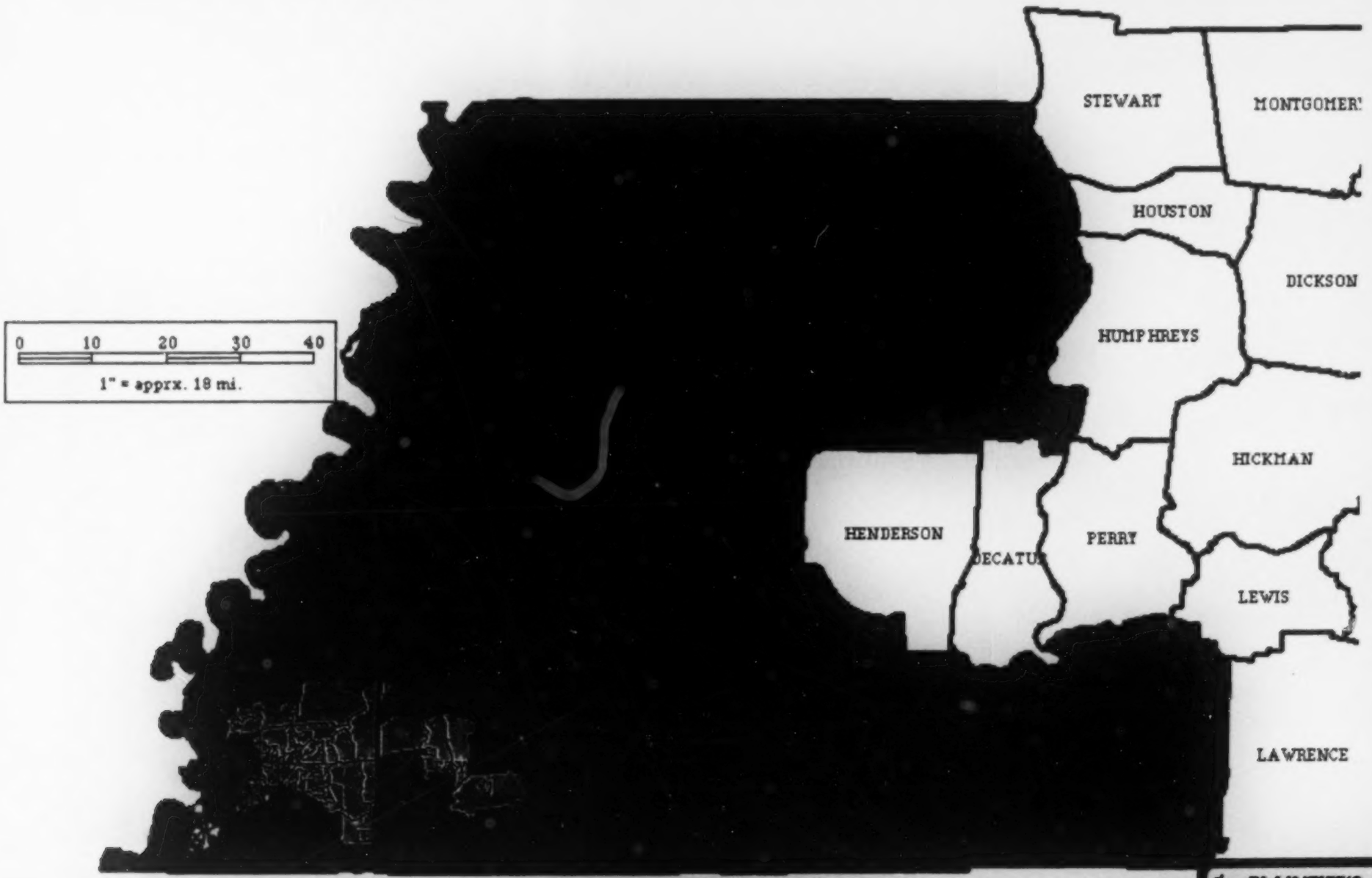
Rural Majority-Black District (red) and Modified Districts Fitting Into Adopted State Senate Plan



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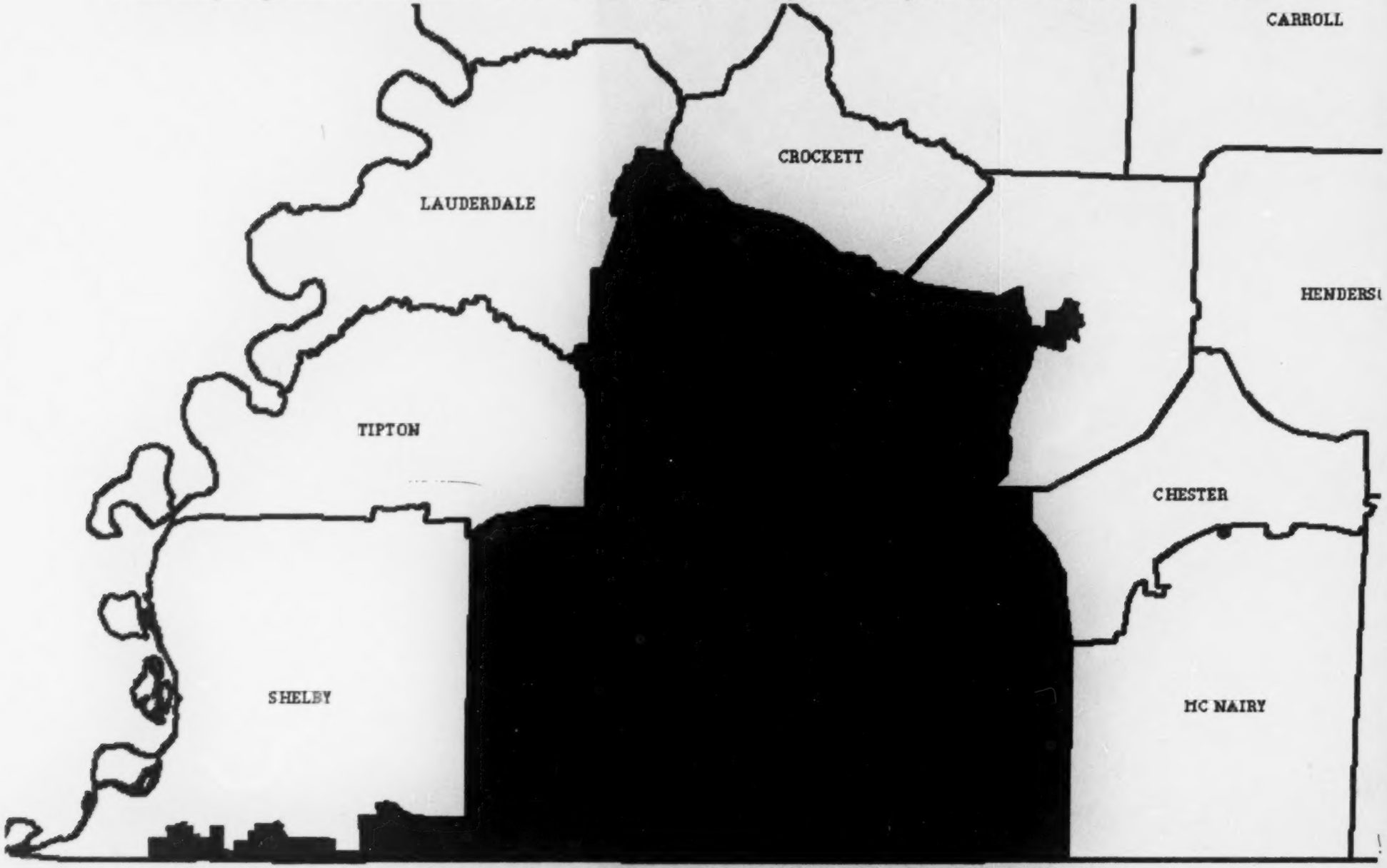
PLAINTIFF'S EXHIBIT P 24

Rural Majority-Black Senate Dist. 1 Including All of Fayette, Haywood, & Hardeman Counties



Supreme Court, U.S.
FEB - 3 1994
OFFICE OF THE CLERK

No. 93-1108
IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1993

NED McWHERTER, Governor of Tennessee, et al,
Appellants,

v.

RURAL WEST TENNESSEE AFRICAN AMERICAN AFFAIRS COUNCIL, INC., et al,
Appellees.

Appeal from the United States District Court
for the Western District of Tennessee

BRIEF OF AMICUS CURIAE STATE OF MICHIGAN IN SUPPORT OF JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I.

Whether in a vote-dilution challenge to a legislative districting plan under Section 2 of the Voting Rights Act, statewide percentages are the proper measure of proportionality even where the evidence of vote dilution focuses only on one limited region within the State.

II.

Whether a legislative districting plan may be held to violate Section 2 of the Voting Rights Act based on its failure to create an additional majority-minority district drawn solely on grounds of race and in disregard of traditional districting principles.

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STATEMENT OF INTEREST OF AMICUS CURIAE

In NAACP, et al v Austin, et al, No. 92-CT-72696-DT (ED, Mich), Amicus State of Michigan is currently defending a challenge to its 1992 legislative apportionment plan in which the plaintiffs allege that the Michigan Supreme Court violated Section 2 of the Voting Rights Act of 1965, as amended, 42 USC § 1973 and the Fourteenth and Fifteenth Amendments to the United States Constitution by failing to create the maximum number of majority-minority districts possible based on statewide black population figures. Essentially plaintiffs are seeking to "maximize" or "optimize" the number of majority-black districts that could be created in Wayne and Oakland Counties (and in Michigan) which the State maintains is not required by the Voting Rights Act.

Plaintiffs' Complaint alleges that the State of Michigan's legislative districting plan violates Section 2 "by establishing only 4 Senate districts and no more than 13 house districts ... with an electorally effective black majority" when "5 Senate Districts and 15 House districts could have been created". (Paragraph 16 of the Complaint) The State of Michigan has raised the defense of sustained proportional representation. Depending upon how proportional representation is calculated, the State's plan provides black voters in Wayne and Oakland Counties, the geographical area in dispute, with proportionality whether calculated based on voting age population (VAP) or population. If calculated on VAP statewide, mathematically proportional representation would be 14 dis-

tricts in the House and 4.8 in the Senate. Plaintiffs claim that the Voting Rights Act requires the creation of 5 Senate districts and 15 House districts based on their assertion that the Voting Rights Act requires calculating representation on statewide population basis. With the exception of a majority-black district created in Genesee County, there are no areas outside of Wayne and Oakland Counties in Michigan in which the population of blacks are sufficiently large and compact to enable the creation of a majority-black House or Senate District. To create additional districts would require the State of Michigan to disregard its constitutional redistricting criteria and make race the paramount criteria in drawing lines subject only to one person - one vote requirements of the

United States Constitution. The three-judge panel in NAACP v Austin has requested supplemental briefs from the parties analyzing the panel decision in the instant case and its possible application to the Michigan litigation.

This brief amicus curiae is submitted by the State of Michigan in order to urge this Court to note probable the instant case because it raises two substantial and unsettled questions of law which, if decided by this Court, will significantly impact upon the voting rights litigation scheduled for trial April 18, 1994 in NAACP, et al v Austin, et al, No. 92-CT-72696-DT (ED Mich) and cases pending in other states.

SUMMARY OF ARGUMENT

In a vote-dilution challenge under Section 2 of the Voting Rights Act to a legislative districting plan, a defense of sustained proportional representation may be established by use of statistics concerning voting age population within the geographic area in dispute. A valid defense of sustained proportional representation cannot be obviated by the use of statistics concerning population or voting age population on a statewide basis.

A legislative districting plan may not be held to violate Section 2 of the Voting Rights Act based on a failure to create additional majority-minority districts drawn solely on grounds of race and in disregard of traditional legiti-

mate districting principles such as compactness, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between incumbent office-holders.

ARGUMENT

THE COURT SHOULD NOTE PROBABLE JURISDICTION IN McWHERTER, ET AL v RURAL WEST TENNESSEE AFRICAN AMERICAN AFFAIRS COUNCIL, INC, ET AL

The State of Michigan, and other states, need clear guidance from this Court on both issues raised by Appellant in its Jurisdictional Statement.

The first question, whether in a vote-dilution challenge to a legislative districting plan under Section 2 of the Voting Rights Act, statewide percentages are the proper measure of proportionality even where the evidence of vote dilution

focuses only on one limited region within the State, ties directly into the issue of how to calculate proportional representation under the Voting Rights Act in order to prove a defense of sustained proportional representation. The Voting Rights Act expressly provides that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 USC § 1973(b).

As noted by the Appellants, the courts have uniformly rejected the suggestion that the Voting Rights Act or the Constitution require proportional representation for minority groups. See e.g., Davis v Bandemer, 478 US 109, 130 (1986). Since proportional representation is not

required by the Voting Rights Act or the Constitution, proof of sustained proportional representation is logically a complete defense to a Section 2 vote-dilution claim.

According to the Senate Report that accompanied the 1982 amendments to the Voting Rights Act, the "right" question to be asked in a Section 2 vote-dilution lawsuit is whether "as a result of the challenged practices or structure plaintiffs do not have equal opportunity to participate in the political process and to elect candidates of their choice.?" S. Rpt. No. 97-417, 97th Cong. 2nd Sess. at 28. This means that plaintiffs in a Section 2 lawsuit have the burden of showing, inter alia, that "a bloc voting majority must usually be able to defeat

candidates supported by a politically cohesive, geographically insular minority group." Thornburg v Gingles, 478 US 30, 49 (1986) (emphasis in the original). If a minority group has sustained proportional representation, it cannot be said as a matter of law that a bloc voting majority "usually" defeats its preferred candidate. Nor can it be said that the minority group has been denied "an equal opportunity to participate in the electoral process and elect candidates of their choice," because proof of sustained proportional representation is proof of at least equal opportunity.

Justice Brennan, in a portion of his opinion joined by Justice White, thus noted:

> The District Court did err, however, in ignoring the significance of the sustained success black voters have

> experienced in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.
>
> In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representative, but Appellees have not done so here. * * * Consequently, we believe that the District Court erred, as a matter of law, in ignoring the sustained black voter success in house District 23, and would reverse with respect to that District. 478 US at 77 (emphasis in the original, footnote omitted)

Although Justice Brennan suggested that there were "some situations" in which the existence of sustained proportional representation might not suffice to defeat a Section 2 claim, it is note-

worthy that he engaged in no such "totality of the circumstances" analysis in the case of District 23. Despite findings by the trial court of historical voting discrimination, in dismissing the Section 2 claim in regard to District 23, Justice Brennan relied on little else than the reality of proportional representation for blacks in that district. Gingles, 478 US at 38-39, 80.

Justice O'Connor, in a concurring opinion joined by three Justices stated: "I agree with Justice Brennan that consistent and sustained success by candidates preferred by minority voters is presumptively inconsistent with the existence of a § 2 violation." 478 US at 102.

In all, six Justices concurred in the result dismissing the Section 2 claim regarding District 23.

The problem that has arisen since Gingles is the proper calculation to be used in determining proportional representation when the alleged Section 2 violation is the failure to create more majority-minority districts.

Arguments that statewide population figures should be used to determine the maximum number of districts possible for proportional representation calculation totally ignores the reality of where people live and vote. The use of statewide population, or statewide VAP as used by the district court in West Tennessee, results in including minorities scattered across the state who are not "sufficiently large and geographically compact to constitute a majority in a single member district." Gingles, 478 US at 50.

As stated by the Appellants, this method of calculation "reflects the principle of virtual representation." i.e. that representatives elected from majority-minority districts have the obligation, not merely to represent their own constituents, but also those individuals living elsewhere within the state who share the racial characteristics of those constituents. This notion of representative government finds no basis in the Voting Rights Act or in American history. See Shaw v Reno, ___ US ___; 125 L Ed 2d at 529-30, Gingles, 478 US at 50, fn 17.

While the district court in West Tennessee rejected the use of statewide population figures to calculate proportional representation, it still used statewide VAP figures to assess propor-

tionality notwithstanding the fact that the proofs were focused on the geographical areas in which blacks were sufficiently concentrated to enable the creation of an additional majority-minority district. As noted at page 12 of Appellants' Jurisdictional Statement, reversal of the district court's use of statewide VAP calculations would make a critical difference to the result in this case and to the State of Michigan's pending litigation where sustained proportional representation has been raised as a defense. As noted by Appellants at page 13 of their Jurisdictional Statement, the three-judge panel in Nash v Blunt, 797 F Supp 1488, at 1498-1499, 1506-1507 (WD Mo, 1992) aff'd, 113 S Ct 1809 (1993), held that proof of a "past trend" of proportional representation,

combined with evidence that the challenged plan is likely to continue that trend is an "affirmative" and "legal defense" to a "plaintiff's § 2 claim." In calculating proportionality the Nash court rejected the use of statewide calculations as used by the court in West Tennessee, and used the challenged geographical area to determine proportionality. See also Baird v Consolidated City of Indianapolis, 976 F2d 357, 360 (7th Cir, 1992), cert den, 113 S Ct 2334 (1993), which used the challenged geographical area to determine proportional representation.

Clearly, guidance from this Court on the proper measures to be used in calculating proportional representation is needed to both assist state apportionment

bodies in determining whether there are any potential Voting Rights Act problems with their plans and to avoid needless and expensive litigation.

The second question raised by Appellants, whether a legislative districting plan may be held to violate Section 2 of the Voting Rights Act based on its failure to create an additional majority-minority district drawn solely on grounds of race and in disregard of traditional districting principles, goes to the heart of the issue faced by apportioning bodies: what does the Voting Rights Act really require when drawing district lines? The proposition that the Voting Rights Act requires apportioning bodies to create the maximum number of black majority districts in total dis-

regard of legitimate State redistricting criteria makes race the paramount factor subject only to one person-one vote requirements of the United States Constitution. This is the result of the court's ruling in West Tennessee.

In West Tennessee, the court concluded that integrity of county boundaries was a factor "which clearly weighs in favor of the State" when looking at the totality of the circumstances. (Slip Opinion, p 12). However, the court found that there were some practical problems with weighing the state's interests under the totality of the circumstances test, stating:

> Because the state interests would not be a signal of dilution like other Section 2 factors (including the tenuousness of state interest), a court analyzing a Section 2 claim under the proposed balancing framework would no longer ask only

> whether, under the totality of the circumstances, there is unequal opportunity to participate in the political process. The court would also ask whether in light of the state interests, the unequal opportunity to participate is sufficient to support a finding of liability under Section 2. In other words, the state interests would have to be weighed against proven vote dilution. The problem with such a framework from a district court's perspective is the lack of standards to such an approach. (Slip Opinion, p 19, quoting from League of United Latin American Citizens v Clemens, 986 F2d 728, 763 (5th Cir, 1993), cites omitted.)

The court resolved this "lack of standards" by finding, slip opinion, p 19, "... that the state's interest in an electoral scheme are only relevant to the extent that those interests are compromised by a possible § 2 remedy. * * * When potential remedies do not impinge on the state's interests those interests need not be considered" and ignored the

state's legitimate interest in protecting county boundaries in its assessment of the totality of the circumstances analysis. Yet both plans submitted by the Plaintiffs to meet the first Gingles precondition of compactness required breaking county lines solely based upon the race of the voter in order to create more majority-minority districts. The result was to apply race as the controlling factor to the total disregard of the state's apportionment criteria. This ruling is inconsistent with the notion that a state has legitimate considerations in the redistricting process that go beyond the Voting Rights Act. These other considerations include "making districts compact, respecting municipal boundaries, preserving the cores of prior districts and avoiding contests between

incumbent" office-holders. Karcher v Daggett, 462 US 725, 740 (1983).

Even constitutionally-grounded population equality has not been thought to trump each of these considerations in a way that the Voting Rights Act would under the West Tennessee ruling. See Brown v Thompson, 462 US 835, 842 (1982), where this Court held that "some deviations from population equality may be necessary to permit the States to pursue other legitimate objectives." This Court has held that "district lines obviously drawn for purposes of separating voters by race requires careful scrutiny under the Equal Protection Clause of the Fourteenth Amendment regardless of the motivations underlying their adoption." Shaw, ___ US ___; 125 L Ed 2d 511, 527

(1993). See also Hayes v Louisiana, No. 92-CV-1522 (WD La, Dec. 28, 1993).

Direction from this Court in how to balance the States' legitimate interests in redistricting with the requirements of the Voting Rights Act is sorely needed to resolve current Voting Rights Act challenges and to avoid them after the next census in 2000.

CONCLUSION

This Court should note probable jurisdiction or, at a minimum, hold this appeal in abeyance and dispose of it as appropriate in light of its pending decision in Johnson v DeGrandy, No. 92-516, 61 USLW 8580 (prob. juris. noted Feb. 22, 1993).

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether, in a vote dilution challenge to a statewide legislative redistricting plan under Section 2 of the Voting Rights Act, statewide demographic percentages are the proper measure of undiluted minority voting strength where: (i) appellees challenged the entire plan; (ii) the evidence of unequal access was statewide; (iii) the three-judge court made statewide findings of vote dilution; and (iv) the use of area demographic percentages would not affect the outcome of the case?

2. Whether the finding of the court below that plaintiff-appellees' proposed black-majority districts in rural west Tennessee are compact is properly before the Court, and if so, whether the finding is clearly erroneous?

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RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled case move to dismiss or affirm on the grounds that the appeal is based upon speculative contingencies and that the questions presented are so unsubstantial as not to need further argument.[1]

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1. Although appellees contend that the three-judge court should have used total rather than voting age population in its analysis and have filed a notice of cross appeal, that issue is not involved in this appeal. Jurisdictional Statement ("J.S."), Questions Presented at (i).

STATEMENT OF FACTS

The statement of facts as presented by appellants is incorrect and misleading, and requires correction.

Appellees, plaintiffs below, are the Rural West Tennessee African-American Affairs Council, Inc. ("RWTAAAC"), a non-profit corporation in Tennessee whose purpose is to promote voter registration, education, and participation,[2] and eight African-American residents and registered voters of Tennessee. Appellees contended in the court below that the 1992 redistricting for the Tennessee State Senate diluted minority voting strength in violation of the Constitution of the United States and Section 2 of the Voting Rights Act, 42 U.S.C. §1973. Following a trial on the merits, the three-judge district court ruled on November 4, 1993, that "under the totality of the circumstances the 1992 Senate reapportionment plan violates Section 2." Jurisdictional Statement Appendix ("J.S. App.") 28a.

Appellants contend that "[t]he statutory claim — decided by the district court and at issue in this Court — was that the Senate Plan dilutes the votes of African-Americans in seven counties in southwest Tennessee in violation of Section 2 of the Voting Rights Act," and that "appellees' vote-dilution evidence . . . was limited to southwest Tennessee." J.S. 3-4. The contentions that the litigation was limited to one area of the state are flatly contradicted by the evidence in this case, as well as the findings of the three-judge court.

In their complaint, appellees charged that "[t]he newly enacted legislative districts *in Tennessee* dilute the voting strength of African-Americans." Complaint, para. 23 (emphasis added). Further, the three-judge court found that

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2. There are no parent companies or subsidiaries of RWTAAAC. The Memphis Branch NAACP intervened in this action, but is not a party to this appeal.

appellees challenged "Tennessee's 1992 apportionment of its 33 state Senate districts." J.S. App. 2a; *see also* J.S. App. 18a-19a ("what is really at issue, is the entire plan . . . whether the minority within the applicable jurisdiction, in this case the state, suffers from vote dilution"). Thus, it is clear that appellees' claim, and the issue decided by the three-judge court, was not limited to vote dilution in the seven counties in southwest Tennessee, but went to the "results" under Section 2 of the entire senate redistricting plan.

It is equally clear that appellees' evidence of vote dilution was not limited to southwest Tennessee. Although appellees focused on southwest Tennessee because that was the area of the state in which additional majority-black districts could be drawn, they alleged in their complaint, Complaint, para. 20, a *statewide* pattern of discrimination against blacks, including discrimination in voting. And at trial, appellees introduced substantial evidence in support of their statewide allegations. *See, e.g.*, Pl. Ex. 11, Plaintiffs' First Request for Judicial Notice as to Law and Judicial Decisions; *see also* Pl. Exs. 50-56, 69.[3]

Based upon the evidence presented at trial, the three-judge court made statewide findings of fact where relevant. The court held that "based upon the evidence presented at trial, we find that the lack of black electoral success *in Tennessee* is a factor which weighs in favor of a finding of vote dilution." J.S. App. 18a (emphasis added). According to the court, "[w]e agree . . . with the plaintiffs' position that the proper scope of our review

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3. Pl. Ex. 11 was a compilation of laws and judicial decisions, many of which were of statewide application. Pl. Ex. 50 showed voting, election, poll tax, population, political party, and black population statistics for the state as a whole. Pl. Ex. 56, a report of the U.S. Commission on Civil Rights, showed black office holders throughout the state as of February 1, 1968. Other exhibits showed statewide census data by race, voter registration, and state requirements for registration and voting.

is the entire state." *Id.* Taking into account statewide voting patterns and cohesion, the court found that "no black from a majority-white district has won a seat in the state Senate this century," J.S. App. 20a, and that under the challenged plan, "blacks can expect to hold 9.1% of the Senate seats, the same percentage blacks now hold." *Id.* The court concluded that "the level of black electoral success in the state Senate indicates that the Senate reapportionment plan will result in minority vote dilution." *Id.* Thus, appellants' claim that the district court "found" vote dilution only as to southwest Tennessee, J.S. 4, is incorrect.

The three-judge court made other findings showing vote dilution outside southwest Tennessee and that blacks are politically cohesive on a statewide basis. The court found that "Tennessee has a long history of official racial discrimination in voting. Although the worst discrimination is in the past, effects of past discrimination are still apparent." J.S. App. 14a. Slavery was "officially sanctioned" throughout the state prior to the Civil War. J.S. App. 15a. In 1834 the state Constitution was amended to deny the right to vote even to free black men. *Id.* Following Reconstruction and the advent of Jim Crow, blacks were again effectively disfranchised on a statewide basis in Tennessee. *Id.* The state legislature passed laws in 1889 and 1890 "requiring voter registration; separate ballot boxes for local, state and national elections; single, nonpartisan ballots; and a poll tax. These laws had the primary purpose and effect of reducing black political participation." *Id.*[4]

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4. Such evidence on which the court based its findings is the kind lower courts have traditionally relied upon to prove racial bloc voting and political cohesion. *See, Nevett* v. *Sides*, 571 F.2d 209, 223 n.18 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980) (racial bloc voting may be shown by, among other things, "the 'existence of past discrimination in general,'") (*quoting Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd*, 424 U.S. 636 (1976)); *United States* v. *Marengo County Commission*, 731 F.2d 1546, 1567 n.34 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984); *League of United Latin American Citizens* v. *Midland Independent School Dist.*, 812 F.2d 1494, 1500-01 (5th Cir. 1987), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987) (political cohesiveness may also be shown by a "share[d] com-

While appellants argued generally that a statewide focus was inappropriate, they made no effort to rebut appellees' evidence of black voter cohesion statewide. Indeed, at trial as part of their evidence of responsiveness, appellants introduced "a long list of measures passed by the General Assembly aimed primarily at helping the black community." J.S. App. 21a. Appellants stipulated to black voter cohesion in southwestern Tennessee.

Moreover, in their brief in support of their motion to alter or amend the judgment of the three-judge court in the consolidated case of *Langsdon* v. *Milsaps*, No. 92-2415 (W.D. Tenn. Sept. 15, 1993),[5] appellants acknowledged that blacks were politically cohesive and that racial bloc voting existed throughout the state. One of appellants' principal arguments in support of their motion was that the *Langsdon* plaintiffs' alternative plan would violate Section 2 "by diluting minority voting strength in a number of areas throughout the State." Brief of Defendants in Support of Motion to Alter or Amend Judgment at 3. One of those areas was Hamilton County, in the eastern Tennessee. *Id.* at 9. Of course, appellants' representation that the Langsdon plaintiffs' proposed plan would violate Section 2 would be without any foundation unless blacks were politically cohesive throughout the state and voting was racially polarized.

Appellants also claimed in support of their motion to alter or amend that the state's plan "avoids the underrepresentation of

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mon experience in past discriminatory practices," as well as "common social, economic, and political interests which converge and make them a cohesive political group").

5. In *Langsdon* v. *Milsaps*, *supra*, the three-judge court declared the state house plan unconstitutional under the equal protection clause of the Fourteenth Amendment. J.S. App. 2a.

the disproportionately undercounted African-American population'' in various parts of the state, including Davidson and Hamilton Counties, neither of which is in the southwest part of the state. *Id.* at 15-16. Again, the very premise of such a claim is the belief that the black population throughout the state is politically cohesive.

In view of the evidence and findings of the three-judge court, appellants are clearly wrong in contending that there was no proof of vote dilution or minority cohesion outside southwest Tennessee.

SUMMARY OF ARGUMENT

The three-judge court did not err in using statewide demographic figures as the measure of undiluted minority voting strength because there was substantial evidence of vote dilution outside southwest Tennessee and proof that African-American voters are politically cohesive on a statewide basis. J.S. 5-6, 8.

The decision below is not in conflict with decisions of other lower courts. Appellees challenged, and appellants defended, the entire Tennessee senate redistricting plan. In such cases, courts have consistently applied a statewide (or jurisdiction-wide) impact analysis. *See, e.g., Jeffers* v. *Clinton*, 730 F. Supp. 196, 198 (E.D. Ark. 1989), *aff'd*, 498 U.S. 965 (1991).

It would make no difference to the outcome of this appeal if the court below had used local, as opposed to statewide, demographic percentages. The measure of undiluted minority voting strength based on voting age population (''VAP'') using west Tennessee percentages would be 2.65—or three—senate seats. Three seats would be the appropriate measure, not because blacks are entitled to proportional representation or to be over-represented, but because senate seats cannot be subdivided. Given the problem of fractional remainders, and laying aside the issue of racial fairness, three would be a statistically more accurate representation of VAP than two seats. *See, United*

States Dept. of Commerce v. *Montana*, 112 S. Ct. 1415, 1420-21 (1992) (discussing the problem of fractional remainders in connection with congressional reapportionment and approving the technique, known as the "method of major fractions," of rounding up or down depending on whether the fractional remainder is greater or less than one-half). Since there are presently only two majority black senate districts in west Tennessee, blacks would be entitled to a third seat as the remedy for the dilution of their voting strength.

The lower court ruled that "only one more majority-black district must be drawn in west Tennessee," and left the location of the district to the discretion of the legislature. J.S. App. 29a. Since appellants are free to draw the additional senate district in Shelby County, as to which they make no claim involving lack of compactness, the issue of whether a compact district can be drawn in rural west Tennessee is academic. In the past this Court has refused to hear cases which lacked "immediacy and reality." *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969).

The finding of the court below that plaintiffs' proposed redistricting plans were compact and not oddly shaped is not clearly erroneous or based upon errors of law. Appellees' plans were drawn to comply with the one-person, one-vote requirement, to reflect communities of interest, to be contiguous and compact, to comply with state policy of respecting county boundaries, and to avoid diluting minority voting strength.

ARGUMENT

I.
The Court Below Did Not Err in Using Statewide Percentages.

Appellants claim that the three-judge court erred in using statewide figures as the measure of undiluted minority voting strength because there was no evidence of vote dilution outside southwest Tennessee or any proof that African-American

voters are politically cohesive on a statewide basis. J.S. 5-6, 8. Appellants say that this issue is presently pending before the Court in *Johnson* v. *De Grandy*, No. 92-519 (and related cases), and that this Court should note probable jurisdiction or hold this appeal and dispose of it as appropriate in light of its decision in *Johnson* v. *De Grandy*. J.S. 7, 19.

The fatal flaw in appellants' argument is that, as noted above, there is substantial evidence of vote dilution outside southwest Tennessee and substantial proof that African-American voters are politically cohesive on a statewide basis. The identities of the minority groups in *De Grandy* and this case are also dissimilar. In *De Grandy*, the minority class included African-Americans, Cubans, other Hispanics, and a substantial percentage of non-citizens. This case involves a single racial minority that is cohesive statewide. Thus, no matter how the statewide percentages issue in *De Grandy* may be decided, *De Grandy* is factually and fundamentally distinguishable from the instant case.

Appellants also argue that the use of statewide figures would be appropriate only if appellees proved that blacks were geographically compact in every area of the state. J.S. 9. Such an argument fails to grasp the concept of geographic compactness as it is used in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986), for a minority *by definition* could never be geographically compact in every area of a state, or a county or a city. The geographic compactness requirement is not intended, as appellants believe, to identify which persons have had their votes diluted, but to determine if dilution is caused by geographic dispersal of the minority population as opposed to the construction of a challenged plan. As the Court held in *Gingles*, "[u]nless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." 478 U.S. at 50 n.17.

Appellants' reliance on the treatment of proportional representation in District 23 in *Gingles* to support their argument, J.S. 10, is also misplaced. In *Gingles*, plaintiffs alleged that the voting strength of blacks in particular multimember districts was diluted because voting was at-large rather than from districts. Plaintiffs did not claim that the boundaries of the districts were drawn in such a way as to dilute minority voting strength, a claim more analogous to the one in this case. As far as District 23 was concerned, the Court found simply that blacks had been consistently proportionately represented and that minority voting strength was not diluted. In addition, because the acceptance or rejection of the challenge to District 23 would not have affected the extent to which blacks were represented statewide, the question whether there was statewide proportional representation was irrelevant.

Appellants are also in error in claiming that the decision in *Nash* v. *Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), *aff'd sub nom. African-American Voting Rights Legal Defense Fund, Inc.* v. *Blunt*, 113 S. Ct. 1809 (1993), is in conflict with the decision of the three-judge court in this case. In *Nash* v. *Blunt* the plaintiffs challenged *only* three portions of the 1991 Missouri House of Representatives redistricting plan. 797 F. Supp. at 1492. In this case, appellees challenged, and appellants defended, the entire Tennessee senate redistricting plan.[6]

Appellants' reliance on *Nash* v. *Blunt* is misplaced for the further reason that the statewide percentage language was *dicta*. That case was decided on the ground that plaintiffs had

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6. *NAACP* v. *Austin*, No. 92-CV-72696-DT (E.D. Mich), also relied upon by appellants, J.S. 7, 13, is not in conflict with the decision of the three-judge court for the reason that there has been no decision in that case nor any determination of the statewide percentages issue.

failed to prove legally significant racial bloc voting. 797 F. Supp. at 1506. Moreover, as appellees' motions to dismiss or affirm in *African-American Voting Rights Legal Defense Fund, Inc.* v. *Blunt* make clear, there were several grounds for affirmance that had nothing to do with the merits of the district court's decision, including appellants' failure to include any argument in their jurisdictional statement. *See*, No. 92-1249, Motion of Appellees Blunt and Ashcroft to Dismiss at 18-19. Summary affirmance determines only those issues that were "necessarily decided." *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977).

There is no conflict between the decision of the three-judge court in this case and the decisions of other lower courts. Courts have consistently applied a statewide (or jurisdiction-wide) impact analysis in redistricting cases. *See, e.g., Jeffers* v. *Clinton*, 730 F. Supp. at 198; *Burton* v. *Sheheen*, 793 F. Supp. 1329, 1346 (D.S.C. 1992), *vacated and remanded on other grounds sub nom. Statewide Reapportionment Advisory Committee* v. *Theodore*, 113 S. Ct. 2954 (1993). Nor is there any basis upon which to argue that the judgment below will likely be affected by *De Grandy*. Accordingly, no purpose would be served by full briefing and argument.

II.
The Use of Area Percentages Would Not Affect the Outcome of the Case.

Although the three-judge court used statewide demographic percentages, it would make no difference to the outcome of this appeal if the court had used only the demographic percentages in west Tennessee in determining the level of undiluted minority voting strength. Appellants' argument to the contrary, J.S. 11, is a house of cards based upon the manipulation of figures and disregard for the practical requirements of redistricting.

The total population of Tennessee is 4,877,185. Given a state senate consisting of 33 members, ideal district size would be 147,793. The total population of the seven counties in west Tennessee is 1,033,744. Thus, in conformity with the population based one-person, one-vote standard, west Tennessee would be allotted 6.99—or seven—senate seats (1,033,744 / 147,793 = 6.99).[7]

In the practical world of redistricting, senate seats cannot be subdivided. Fractional remainders must either be disregarded entirely or treated as equal to a whole senator. *See United States Dept. of Commerce* v. *Montana*, 112 S. Ct. at 1419 (discussing the problem of fractional remainders in connection with congressional reapportionment). Under the circumstances, allocating seven seats to west Tennessee would more nearly comply with one person, one vote than allocating only six seats. Under a seven seat configuration for west Tennessee, the deviation from ideal size would be -.08% (1,033,744 / 7 = 147,678 / 147,793 = -.08). Under a six seat configuration, the deviation from ideal size would be + 16.58% (1,033,744 / 6 = 172,291 / 147,793 = + 16.58).

The method of rounding up or down depending on whether the fractional remainder is greater or less than one-half is a commonsense approach. It is known as the "method of major fractions," and is regarded as "a workable solution of the fractional remainder problem" in redistricting. *United States Dept. of Commerce* v. *Montana*, 112 S. Ct. at 1420-21. Although there are other methods of solving the problem of fractional remainders, any method that failed to produce seven senate

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7. Under the existing plan, there are actually eight senate districts that include some portion of the seven counties in west Tennessee. Six of the districts are in Shelby County.

seats in west Tennessee under appellants' hypothetical would violate the one-person, one-vote standard of the Fourteenth Amendment.

For example, if under a six seat plan the non-west Tennessee population were allocated equally to the remaining 27 senate districts, the deviation of each district would be -3.68% (4,877,185 -1,033,744 = 3,843,441 / 27 = 142,350 / 147,793 = -3.68). When this deviation is added to the plus deviation of 16.58%, the total deviation among districts under appellants' hypothetical would be 20.26% (3.68 + 16.58 = 20.26%), a deviation that is unacceptable under the one-person, one-vote requirement. *Mahan* v. *Howell*, 410 U.S. 315, 329 (1973).

Although the state used total population in determining ideal district size and in redistricting the senate, in its Jurisdictional Statement the state used voting age population ("VAP") to make the identical calculations. J.S. 11-2. Since blacks are a smaller percentage of VAP than total population, the only purpose of this arithmetical sleight of hand was to reduce the ideal percentage of seats allocable to west Tennessee (from 7, or 6.99, to 6.76), and to attempt to limit the remedy in this case.

While total population is the standard used in redistricting, the three-judge court held that VAP is the measure under Section 2 for determining a minority's undiluted share of the allocated seats. J.S. App. 19a-20a. Blacks are 37.87% of VAP in west Tennessee. Using appellants' hypothetical, the measure of undiluted minority voting strength based on VAP would be 2.65—or three—senate seats (37.87 x 6.99 = 2.65).[8] Again, three seats would be the appropriate measure, not because

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8. The standard of undiluted minority voting strength based on total population, which appellees contend in their cross-appeal is the proper measure, would be 2.91 (41.61 x 6.99 = 2.91).

blacks are entitled to proportional representation or to be over-represented, but because senate seats cannot be subdivided. Given the problem of fractional remainders, and laying aside the issue of racial fairness, three seats would be a statistically more accurate representation of minority (as well as majority) VAP than two seats.[9]

Since there are presently only two majority-black senate districts in west Tennessee (the third majority black senate district is in Davidson County, which includes the city of Nashville), blacks would be entitled to a third seat in west Tennessee as the remedy for the dilution of their voting strength whether statewide or west Tennessee demographic percentages were used. This appeal does not warrant plenary review.

III.
The Issue of Compactness Is Based Upon Speculative Contingencies and Does Not Warrant Full Review.

Appellees claimed, *inter alia*, that the state's plan "packed" blacks in Shelby County (one of the western counties which includes the city of Memphis) into two majority black districts and that an additional majority black district could have been drawn. They also claimed that the state's plan fragmented blacks in the six rural counties in west Tennessee (Tipton, Lauderdale, Haywood, Madison, Fayette, and Hardeman) and that one majority black district could have been draw in that

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9. The state, moreover, accepted and took into account in its redistricting the census bureau's estimates that "African-Americans were undercounted in the 1990 census by 4.8% while non-blacks were undercounted by 1.7%" Brief of Defendants in Support of Motion to Alter or Amend at 12. The admitted minority undercount, including in Shelby County, adds force to the argument that three seats would be the proper measure of undiluted voting strength if west Tennessee percentages were used.

part of the state. J.S. App. 3a. The three-judge court made a specific finding of vote dilution in "west Tennessee," *i.e.*, in Shelby County and the six rural counties. J.S. App. 28a. However, the court ruled that "only one more majority-black district must be drawn in west Tennessee," and left the location of the district to the discretion of the legislature. J.S. App. 29a.

Appellants do not contest the finding of vote dilution in Shelby County. Instead, they claim that the finding of vote dilution in *rural* west Tennessee was erroneous because appellees failed to draw a compact majority black district in that part of the state in compliance with *Thornburg* v. *Gingles*, *supra*, and *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993). According to appellants, the districts drawn by appellees in rural west Tennessee "were drawn solely on the basis of race, in disregard of all traditional districting principles." J.S. 6.

Since appellants are free to draw the additional senate district required by the three-judge court in Shelby County, as to which appellants make no claim involving lack of compactness, the issue of whether a compact district can be drawn in rural west Tennessee, while not technically moot, is surely academic. Appellants seek essentially an advisory opinion concerning something they are not required to do by the decision of the three-judge court, *i.e.*, draw a majority black district in rural west Tennessee.[10]

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10. In the event the Court notes probable jurisdiction in appellees' cross-appeal, appellants could raise their compactness argument in support of the decision of the three-judge court, *i.e.*, appellants could argue that only one additional senate district located in Shelby County was required because blacks in rural west Tennessee are not compact. Sup. Ct. R. 18.6 ("[t]he Court may permit the appellee to defend a judgment on any ground that the law and record permit and that would not expand the relief granted").

In the past this Court has refused to hear cases based upon "speculative contingencies," *Hall* v. *Beals*, 396 U.S. 45, 49 (1969), or where the issues lacked "immediacy and reality." *Golden* v. *Zwickler*, 394 U.S. at 109. *See also Board of License Comrs.* v. *Pastore*, 469 U.S. 238, 240 (1985). This appeal does not present this Court with a substantial issue concerning compactness that merits plenary review, and should be dismissed or the finding of liability affirmed.

IV.
The Finding of Compactness by the Court Below Is Not Clearly Erroneous.

Appellants' compactness argument was fully considered and squarely rejected by the three-judge court. According to the court, either of plaintiffs' proposed plans "satisfies the first element of *Gingles*." J.S. App. 7a. Whether this finding is viewed as a finding of a subsidiary fact or an ultimate finding of vote dilution, it is reviewable under the clearly erroneous standard of Fed. R. Civ. P. 52(a). *Thornburg* v. *Gingles*, 478 U.S. at 79 ("the clearly-erroneous test of Rule 52(a) is the appropriate standard for appellate review of a finding of vote dilution").

That the three-judge court's finding of compactness is not clearly erroneous or based upon errors of law is evident from the record in this case. Appellees drew two senate redistricting plans, each containing two majority-black districts. J.S. App. 4a.[11] The second proposed plan showing the rural majority-black senate district is included in the Jurisdictional Statement Appendix at 36a. As is readily apparent, the district is not even

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11. Appellees submitted the second plan, not because the first was deficient in any way, but to show that a rural senate district could be drawn while splitting only one rural county. Shelby County, because of its size, has to be split in any plan.

remotely similar to the district involved in *Shaw* v. *Reno*. There is no basis for contending that the district is "so bizarre on its face that it is 'unexplainable on grounds other than race.'" 113 S. Ct. at 2825. *Shaw* v. *Reno* is simply inapplicable to this case.[12]

Despite appellants' assertions to the contrary, appellees' plans were drawn in conformity with traditional districting principles. They were drawn to comply with the one-person, one-vote requirement of the equal protection clause of the Fourteenth Amendment. They were drawn to reflect communities of interest, *e.g.* urban/rural. They were drawn to be contiguous and compact.

The districts in appellees' plan are much more compact in terms of land area and distance from end to end than several of the majority-white senate districts contained in the state's plan. Senate District 26, Chapter 826 of the Public Acts of 1992, covers nearly twice the land area of the rural senate district in appellees' second plan. From end to end, appellees' district is 86 miles, compared to about 120 miles for adopted Senate District 26. In addition, adopted Senate Districts 10 and 11 in Hamilton County, which split the city of Chattanooga, are much more irregular in shape than appellees' rural senate district.

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12. Whether the constitutional standard in *Shaw* v. *Reno* is applicable to plans drawn by private plaintiffs to comply with *Gingles*, as opposed to plans implemented by a state legislature, is unclear. Since, as the lower court found, the plans drawn by appellees are "only two of the numerous possible remedies," J.S. App. 24a, and the state has adopted no remedial plan of its own, the consideration of *Shaw* v. *Reno* at this stage of the proceedings is arguably premature. However, assuming arguendo that *Shaw* v. *Reno* is fully applicable, appellees' districts are compact based upon any reasonable definition of the term.

Appellees' districts were also drawn to comply, to the extent possible, with state policy of respecting county boundaries. The rural senate district in appellees' second plan split two counties. However, the plan adopted by the state also split counties in forming senate districts. J.S. App. 24a. Indeed, appellees' second plan split only one more county than did the plan adopted by the state. Under the circumstances, appellants' claim that appellees' plan follows no traditional districting principles and violates "the strong state policy of respecting the integrity of county boundaries" is distinctly misleading. J.S. 14a.

Of course, if there is no way to comply with federal statutory and constitutional law without crossing county lines, then state policy must yield. *Reynolds* v. *Sims*, 377 U.S. 533, 581 (1964). The Tennessee Supreme Court has acknowledged as much. *See*, *Lockert* v. *Crowell*, 631 S.W.2d 702, 714 (Tenn. 1982) (state law requirements are of "secondary import to equal protection requirements").

Appellants' *Shaw* v. *Reno* "compactness and traditional redistricting principles" argument is actually based upon a dual, racially discriminatory standard. According to appellants, majority-white districts of virtually any configuration and construction are acceptable, but more regularly shaped majority black districts drawn to take into account compactness, contiguity, communities of interest, the one-person, one-vote requirement, and respect for county boundaries where possible, are not. To accept such an argument, which is an effort to maintain the status quo and blunt minority political participation, would make a shambles of the Voting Rights Act and the Fourteenth Amendment.

Appellees took race into account, but only as one of many factors, and in doing so they did no more than what was required by the decisions of this Court, the decisions of the Supreme Court of Tennessee, and the policy adopted and applied by the Tennessee legislature. In order to establish a

violation of Section 2, this Court has held that the minority group "must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg* v. *Gingles*, 478 U.S. at 50. *Gingles* thus *requires* a plaintiff to take race into account in constructing a proposed redistricting plan. It is simply irrational to argue, as do appellants, that appellees erred by following the express directions of this Court. *See also Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1156 (1993) (there is no prohibition on the creation of "majority-minority districts," unless they are shown to violate Section 2").

State policy also requires redistricting plans to take race into account. The Tennessee Supreme Court has held that "[p]rimary consideration must . . . be given to preserving minority [voting] strength." *Lockert* v. *Crowell*, 631 S.W.2d at 714. It would be impossible to do that without considering race in the redistricting process.

In addition, the Chairman of the state Redistricting Committee, Senator Robert Rochelle, advised the members of the committee in a memorandum dated August 26, 1991 that the state's policy in redistricting was to "be sensitive to the racial balance of the districts and the Senate." Pl. Ex. 22. And as appellees have noted *supra*, the state in its briefs in the *Langsdon* case repeatedly indicated that it took race into account in redistricting allegedly to avoid diluting minority voting strength and to correct for the undercount of the African-American population. To the extent that appellees took race into account in drawing proposed redistricting plans, they were not only following the requirements of *Gingles*, but those of state law and practice as well.

The finding of the three-judge court that plaintiff-appellees' proposed black-majority districts in rural west Tennessee are compact is not clearly erroneous, nor based upon errors of law.

CONCLUSION

For the foregoing reasons the appeal should be dismissed on the ground that it is based upon speculative contingencies, or in the alternative, the finding that Tennessee's senate redistricting plan violates Section 2 should be summarily affirmed on the ground that the questions presented are so unsubstantial as not to require further argument.

Respectfully submitted,

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